IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS, Deceased, by and through MAYOLA WILLIAMS, Personal Representative,	)	
	)	Volume 14-B
Plaintiff,	)	
	)	
vs.	)	No. 9705-03957
PHILIP MORRIS INCORPORATED,	)	Afternoon Session
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled Court and cause came on regularly for hearing before the Honorable Anna J. Brown on Thursday, the 11th day of March, 1999, at the Multnomah County Courthouse, Portland, Oregon.

APPEARANCES

Raymond Thomas, James Coon, William Gaylord and Charles Tauman, Attorneys at Law, Appearing on behalf of the Plaintiff;

James Dumas, Billy Randles, Walt Cofer, John Fraser and Jay Beattie, Attorneys at Law, Appearing on behalf of the Defendant.

KATIE BRADFORD, CSR 90-0148
Official Court Reporter
226 Multnomah County Courthouse
Portland, Oregon 97204
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(Thursday, March 11, 1999, 1:00 p.m.)

P R O C E E D I N G S

Afternoon Session

(Whereupon, the following proceedings were held in open court, out of the presence of the jury:)

THE CLERK: Ready to go on the record Your Honor.

THE COURT: Mr. Thomas.

MR. THOMAS: Professor Bassett, if you could retake the stand.

Your Honor, during the break the plaintiff's counsel worked with the Court's instructions and we have assembled an alternative evaluation procedure which I can present probably best through the witness in terms of the components.

THE COURT: Go ahead.

OFFER OF PROOF

BY MR. THOMAS:

Q. In addition to the evaluation procedure for final condition which we covered during the hearing before the break for lunch is there another valuation procedure for financial condition that is used in the financial world?

A. There is.

Q. And is this one that is used on a day to day basis by stockbrokers, economists, financial advisors, financial analysts?

A. Yes, it is.

Q. And does it work with a value factor that is established by the Standard & Poor organization?

A. Yes.

Q. And could you give the Court -- well, first of all, if this procedure were to be presented as an additional or alternative valuation procedure to the jury, would it be possible to use this procedure without mentioning the words "stock market, stock market price," and without referring to the holding company valuation; in other words, would it be possible to

focus on the defendant in this case and use the valuation procedure without mentioning stock market?
A. Well, it would be possible, but it depends on the earnings of PMI, and it depends upon the value that is placed by the stock market on stocks in general relative to their earnings, so you certainly don't have to mention the stock market, but underlying any price earnings ratio of value, it is the market value, what people do pay for the stocks relative to earnings of major U.S. corporations.
Q. So not for purposes of this hearing, but in terms of the jury, could such information and the fundamentals of the analysis be done without talking about the stock market or the holding company?
A. Yes.
Q. All right. Now, in regard to providing the Court with an understanding of the alternative valuation procedure, please describe to her, I guess maybe from the top, what components of the equation are, what the considerations are and what the result is.
A. Well, the components would be what the

latest reported earnings of PMI are, which for 1998, were approximately 706 million dollars.
And the Standard & Poor is 500 price earnings ratio or the value to earnings ratio, which was between 25 and 30 in 1998.
Q. Could that be expressed to the jury instead of price earnings ratio, with the term value earnings ratio, so that the price aspect would be removed from it?
A. Yes.
Q. All right. Please proceed.
A. And so you would multiply the two together, if you use the lower valuation, 25 times earnings, you would get 17 billion 500 million dollars.
Q. And is that a figure which is slightly higher than the figure that you include in regard to the first calculation method?
A. Yes, because that's as of 1998.
Q. And was the calculation figure that you provided in your testimony one that relates to March 1999?
A. Yes.
Q. And is this the type of analysis which is used by professionals from the field to determine

what the financial condition is of the company?
A. It's a method of valuing the company based on its current earnings.
Q. And in terms of your own preference in terms of coming up with the most realistic conservative component of financial condition for the jury, which do you feel is more accurate?
A. Well, I feel what I did before earlier today is more accurate because it is directly dependent on the price that people are paying in the marketplace today for the holding company.
Q. And I guess that is my -- excuse me.
Okay. Do you ever an opinion to a reasonable economic certainty about whether or not the financial condition of Philip Morris Inc., the defendant presently before the Court, is about 17 billion dollars regardless of which of the two methods described are used?
A. Yes, I do.
Q. And what is that opinion?
A. That that is a fair economic value.
MR. THOMAS: The Court may have inquiry.
THE COURT: I am sure Mr. Dumas would like to inquire to complete the record on this.
MR. DUMAS: Thank you, Your Honor.

OFFER OF PROOF

BY MR. DUMAS:
Q. Dr. Bassett, am I correct in understanding your testimony that you have indicated that the average price earnings ratio as utilized by Standard & Poor is somewhere in the 25 to 30 range?
A. Correct.
Q. And from that average you are extrapolating a net value, based on market value, of PM International pursuant to 1998 earnings of 706 million?
A. PM Incorporated.
Q. Excuse me, PM Incorporated; is that correct?
A. Yes.
Q. Doctor, can you state to a reasonable degree of economic probability, the actual price earnings ratio of Philip Morris Incorporated, not based on a market average, based on this company, given its economic situation, given this climate here today, 1999?
A. There is no PE for Philip Morris Inc. It has to be based on a comparison with other

companies.
Q. Doctor, isn't it true that the price earnings ratio of any company is impacted by the financial markets, assessment of that company's economic situation, including legal factors?
A. Certainly.
Q. Therefore, what may be the correct average price earnings ratio for the Standard & Poor's 500, may not be an accurate price earnings ratio for a specific individual company, correct?
A. That's correct.
Q. Doctor, are you familiar with the price earnings ratio for the holding company, Philip Morris Company?
A. Yes.
Q. What has happened to that price earnings ratio for the last 12 months?
A. Well, it's fluctuated.
Q. Which way has it fluctuated, Doctor?
A. It's gone up and then back down.
Q. Which is an indication, is it not, Doctor, that there is no scientific methodology in establishing a price earnings ratio for any specific company, based on an average of what the market is. It fluctuates inherently from company

to company from month to month based on many factors?
A. Well, I don't agree with you that there is no scientific method. I certainly agree with you that it does fluctuate. It fluctuates with the information that is available to the company on a day-to-day basis.
Q. And you don't have that information for Philip Morris Incorporated, do you?
A. I do, but you've already precluded me from using that information.
Q. Fair enough. Doctor, the information that you have to your opinion of what the appropriate price earnings ratio for Philip Morris Incorporated, is, in fact, based inherently on the price range ratio of Philip Morris Company, the holding company?
A. That's my first opinion.
MR. DUMAS: Thank you. That's all I have.
BY MR. DUMAS:
Q. What is the current price range ratio of Philip Morris today?
A. It's about 18 to 1.
Q. I thought you said that the average was

25 to 30, Doctor?
A. I did.
Q. Well, why isn't Philip Morris Company, why isn't it the average of 25?
THE COURT: Mr. Dumas, tone it down, please.
BY MR. DUMAS:
Q. Why did you select a price earnings ration of 25 for Philip Morris Incorporated? Perhaps you select that number so it just might equal 17 billion?
A. No. It turned out to be a coincidence that it equaled about the same number, but it only equals the same number because the earnings for PMI are very depressed today because of the write off last year in 3.4 billion dollars in litigation costs that were written off against current income.
Otherwise, you would get a much higher value for the company, but I think you asked me something else, and I have lost track of what the other question was.
MR. DUMAS: I think you answered it, Doctor. I have nothing else.
THE COURT: Thank you, Dr. Bassett.

I don't need any more factual information. I do need a summary legal argument from each side on the question, first of all, the admissibility of evidence of the holding company's value as a basis to support the opinion that was first rendered by the witness, so I need argument on that admissibility issue, and then any other summary practical remarks you want to make, and then I'll rule, and we'll get the jury back.

MR. THOMAS: I would like to follow the Court's instruction by starting out with saying that I believe that I established that the -- before lunch, that the method that we used in front of the jury, and after lunch, that the method that was used as an alternative, is the type of analysis which is done by people who are experts in this area to determine financial condition.

Since it is that type of data, and we are not intending to put the actual whole numbers in front of the jury, or the idea of the holding company at all in front of the jury, the actual material which has come from Philip Morris' own documents, and also from our nations financial

services in regard to the valuations on the stock market, as well as Standard & Poor, those materials are permissible in terms of being a reference source under Rule 702 and 703.

So the admissibility of the underlying documents, I don't think is an issue. I guess the question is are the opinions that the expert relies upon in consulting and utilizing those resources admissible.

And I believe that the plaintiff has made a sufficient -- or I would urge that the plaintiff has made a sufficient foundation, that of the three alternative ways that valuation can be shown, the one that we used which came up with the 17 billion dollar figure before lunch was the most accurate.

Because, first, to use some derivation of the holding company's accounting documents fails completely to take into account the true business reality figures in much the same way that valuation of the mortgage, did not take into account the depreciation of the true value of the land.

And that the third S&P based valuation does not reflect as accurately because it really

has to rely upon 1998, and for the method that was chosen by Dr. Bassett, what he was able to do is to actually give us a Marlboro 1999 valuation for PMI, taking into account the various factors that are related upon and considered by experts who be are conducting such valuations, and he testified that this was the most accurate value that he could provide for us on the value of this defendant at that time, which my reading of the statutory criteria requires.

THE COURT: Okay. Mr. Dumas.

MR. DUMAS: Thank you.

As I understand the Court's request, you are hearing arguments solely on the issue of whether this gentleman should be allowed to testify pursuant to his original method, the hypothetical share value method.

THE COURT: What I am trying to do is to roll the clock back and to go through the analysis I would have gone through had I be given the opportunity to before the matter was presented to the jury.

The question is whether plaintiff may offer evidence that puts before jury values of

other Philip Morris companies. And it was my understanding that the defense objected to that evidence on the basis that it was unfairly prejudicial and would -- and would prejudice the jurors in their view of the defendant to a degree that it should be excluded altogether.

I thought I heard that argument coming from the defense in a very summary way yesterday, and there didn't seem to be any dispute about excluding it, so what happened in front of the jury puts some of that evidence theoretically before them.

And now I'm trying to evaluate whether, had we had the hearing on the merits about what the prejudice is and what the options are, what the ruling should be, and that's the first step.

MR. DUMAS: Your Honor, I do not believe the Court should allow that sort of opinion testimony in front of this jury. My client would be prejudice by that because we would not be able to effectively cross-examine the witness on his methodology of how he got there without going into --

THE COURT: But that's my point,

MR. DUMAS: Yeah.

THE COURT: You are not getting my point. My point is why isn't it admissible? Why isn't all of it admissible?

MR. DUMAS: It is overly prejudicial to the defendant. It's not relevant. I'm sorry.

THE COURT: Mr. Dumas, if you want to hear my question, you're going to need to let me finish it. It is admissible evidence to present before the jury, evidence about the financial condition of the defendant. The witness is qualified to offer an opinion.

He has offered an opinion now, two of them, both of which put a value of the defendant at 17 billion dollars. Yesterday and today, you made objections and motions trying to keep away from the jury evidence that had to do with the values or income of the other Philip Morris companies.

I understood those objections were based upon an argument of unfair prejudice. Never presented to me was any argument about what the relevance of that evidence would be. Now, I've got a witness who is saying an acceptable method of valuing a corporation which does not have actual stocks and values in the marketplace is

to look at the positioning of that company in its universe with its holding company.

That is a rational, competent thing for me as an economist to do. Now I have some evidence of a relevant purpose for the evidence. And it's more than just an argument about prejudice and evidence coming in about another company, because I have an expert telling me that this is the way we value. When we have a company that doesn't have stock values, we do it this way. We look at it in its environment, in its big picture.

So how does the prejudicial impact of that outweigh its probative value because right now there is probative value in the fact that the witness who is competent to do that kind of opinion has given it. And if the prejudicial value outweighs the probative value of it because there may be another way for the witness to competently explain his valuation opinion without getting into it.

Where is the line going to be when the defense wants to go excluding the evidence and cross-examine?

MR. DUMAS: It is -- the opinion

testimony is going to be unfairly prejudicial because there is no way the jury is going to be able to distinguish in a rational basis the financial condition of the defendant, Philip Morris Incorporated, as opposed to the financial condition of Philip Morris Holding Companies.

THE COURT: Why do you say that?

MR. DUMAS: Because I think when the jury hearing the term "Philip Morris," a natural inclination is to lump it altogether, the holding company and all the subsidiaries.

THE COURT: I don't find that to be a persuasive argument. If that's the sole ground on which you're arguing that its prejudice outweighs its probative value -- go ahead.

MR. DUMAS: I would also object to the testimony on the basis, Your Honor, that it has absolutely nothing to do with the appropriate inquiry for punitive damages. Punitive damages has nothing to do with the market value of a company.

The jury will be instructed, it is the financial condition of the defendant. A defendant does not have to sell itself to obtain assets. What is relevant in a punitive damages

inquiry is the assets, the value of the assets, what the company has by way of disposable assets to pay, to be punished, not its hypothetical market value should it decide to liquidate itself and sell itself in the open market.

We're barking up, big time, the wrong tree. That's why in every, every punitive damage case I've ever been involved in, the inquiry is the financial -- if it's an individual, it's the financial statement; if it is a public-held corporation, it's the balance sheet, as reflected in the SEC filings.

If it's a closely held corporation, it's the balance sheet. It's assets on one side, liabilities on the other, and net value at the bottom. Those are the assets that the company has available to it to pay any punitive damages award. And it's the appropriate measure for the jury to use as a yard stick in determining how much punishment, quote, unquote, is appropriate.

If I may have a moment, Your Honor.

(Discussion off the record between counsel.)

THE COURT: That's it?

MR. DUMAS: That's it.

THE COURT: Okay. Mr. Thomas, anything else?

MR. THOMAS: If the Court has any questions for me, I'll try to respond.

THE COURT: You probably don't want my real question. Let me think through this for a minute.

The plaintiff is entitled to put on evidence of the financial condition of the defendant. The financial condition, as I said before, we took the noon break is a broad subject. The defendant is in good financial shape; the defendant is in bad financial shape.

The defendant has all these prospect that are going to improve his economic forecast or the defendant has all these things on the horizon that is going to take it down. Everyone is going to stop smoking tomorrow. There are all kinds of things that could affect the financial condition of the defendant.

This is a qualified economist who is entitled to give an opinion about relevant matters. The value of Philip Morris Incorporated is relevant to the inquiry of the defendant's financial condition. Where we're

getting into a problem is the support for the witness's opinion.

Rule 703 says, the witness can give an opinion without having the bases for the opinion be admissible. But fundamental fairness requires that the bases of the opinion be something that can be inquired into in the presence of the jury.

I have the impression based on the factually presentation of the witness that Philip Morris Incorporated, the defendant, is not publicly traded. The witness is confirming, yes, that's right, so we can't go to our local index today to find out what a stock share price would be.

What we heard from the witness before jury was something in the nature of a hypothetical share price, that's my term, the witness didn't use it, but since the defendant doesn't trade, and its shares don't exist out there, there isn't a share price.

The problem we got into was that the hypothetical share price is one that was based upon the evidence of the value of the larger holding company, the parent company, the larger

universe of Philip Morris companies.

The defense had been extremely sensitive, to keep out of the jury's presence any issue about value. And I believe the substance of that concern has to do with the fact that there is already before jury evidence that Philip Morris Incorporated is a substantially wealthy company in its own right, without reference to all of its other assets and holdings.

We had evidence that -- well, we had very big numbers on before the noon hour on the issues of the income, the net income of Philip Morris in the year Mr. Williams died, and the net profit. And these -- it doesn't matter to what reference points those numbers are prepared, those are big numbers, and if what the defense is telling me is they get even bigger when you start pulling in the holding company numbers, and there is a risk of unfair prejudice because the jury is going to be so impassioned over the number of decimals or numbers of multipliers or numbers of sets with three zeros that they'll be so swayed by that and not pay attention to the merits, I suppose I can understand the theory of that.

I mean, these are big numbers, no matter how you look at it. A profitable year that results in something more than a billion dollars in profits for Philip Morris Incorporated is itself evidence of financial condition.

So in the mix, I've got to balance the need for more evidence about financial condition against the risk of unfair prejudice. And somehow, I have to work out what seems to me sort of a whipsaw argument the defense is giving me.

On the one hand, Philip Morris doesn't trade on the market, so that evidence isn't available and can't be used to by itself create or provide the variable for the computation on a chaired value as a measure of worth.

The logical professional approach by an economist is to compare it to its parent and factor there, but the defense doesn't want to do that because it wants to keep the value of the parent corporation out. So it wants to preclude the plaintiff from using a share market hypothetical share price analysis because its information isn't available.

And its own profit-and-loss statements

are apparently not published publicly, and that gives me a little bit of a pause in the fairness aspect.

The witness, over the noon hour, has considered with counsel different approaches and the witness tells me under oath that his opinion of about 17 billion dollars in worth is also supportable by reference to a Standard & Poor multiplier is the way I understand it, multiply a factor of 25 to 30 by the 700 and some millions in last reported earnings for a factor.

And to me, I don't see anything about that analysis that gets afoul of the defendants concern about the values of other Philip Morris companies. It's an approach to deal with the evidence that's before the jury, which is to say, he's already told the jury, in his opinion, there is a 17 billion dollar value, and this is an explanation that the witness adopts from his expertise.

The question is then going to become, where does the defendant go with that in cross-examination and if the cross-examination is like what I have just heard, which is to say referencing the other Philip Morris companies,

and their price earning index then, of course, the door would be open to a different analysis.

But there is no reason why that kind of thinking can't be cross-examined with reference to the fluctuating price earning index, and other data in the marketplace. The fact of the matter is the witness has an opinion.

The witness is entitled because he is trained to express the opinion. The opinion is relevant to the financial condition. I don't agree that net worth is financial condition. Financial condition is not defined as net worth. It is certainly something that would bear on it, but it is not the end all be all or ultimate test.

Mr. Cofer, I am getting some body language here that you want to join this discussion before I'm finished, but you go right ahead.

MR. COFER: Would you mind? Is this a good time?

THE COURT: Well, no, it's not a good, but you go ahead. Proceed, please.

MR. COFER: I do apologize, but the problem is the witness picked 25 or 30 as a

price earnings ratio to apply. He told us that the Philip Morris holding companies price earning ratio is 18. That considers the value of Philip Morris Incorporated tobacco company, Miller Brewing Company, Kraft and General Foods.

Now, the fact is the reason the price earnings ratio is discounted for Philip Morris holding company is because Philip Morris Incorporated, the tobacco company, is discounted because of litigation.

The witness knows that 18 to 25 is not a fair price earnings ratio for Philip Morris Incorporated. And let me bring the Court back do why we are where we are. These plaintiffs filed a motion in limine to exclude any evidence of companies other than Philip Morris., Incorporated.

They chose not for a sue Philip Morris Companies, because they did not want evidence of Kraft, General Foods, Miller Beer, and any other companies. They wanted to focus on the defendant. They precluded us at every opportunity from talking about other holdings and other businesses.

Now, what they want to do is rely on the

wealth of Philip Morris Companies, not a defendant, to inflate the value for punitive damages. The 17 billion dollars is not even the value of Philip Morris Companies.

The stipulated value of Philip Morris Incorporated is available through the case in San Francisco. We offered to make that stipulation in chambers, so what happens is they brought out 17 billion in front of the jury, in violations of motions in limine, to our prejudice, and now over the lunch hour try to come up with same back door rational to come up with 17 billion.

And it is fundamentally unfair, it was intentional and it has prejudiced my client. And I am sorry that I feel strongly about it, because it is simply outrageous. And that's my -- I apologize for interrupting.

THE COURT: Dr. Bassett, tell me again, please, what the 25 to 30 factors represent?

THE WITNESS: Your Honor, that's the average price to the average earnings of the stocks, the 500, that make up the S&P 500, so that's an average across 500 companies.

THE COURT: All right. Thank you.

Is there anything else that anybody wants to say for the record on the issue of admissibility of the evidence of Philip Morris companies generally.

MR. DUMAS: I have one comment, Your Honor, to respond to the Court's observation about fundamental fairness that, on the one hand, the defendant is trying to keep some information away from the public and use that to limit this man's testimony.

What has occurred elsewhere is a request for production is filed which is what normally happens in a punitive damage case for certain kinds of financial information. And what has happened elsewhere to Philip Morris Incorporated is that a balance sheet is produced, and pursuant to that balance sheet, which has net worth, but it was stipulated to on the public record, on the record, in San Francisco and other jurisdictions, three billion four hundred and thirteen million six hundred thousand.

That would have been the normal process, but these plaintiff's lawyers chose not to do this, so Philip Morris Incorporated did not hide the ball, Your Honor. We would have been happy

to have made that balance sheet available for them for inspection which would have given them concrete net worth information.

MR. GAYLORD: Your Honor, could we --

THE COURT: Well, Mr. Cofer spoke so Mr. Gaylord may, too.

MR. GAYLORD: I have gotten some additional information.

THE COURT: Let's get on with it then.

MR. GAYLORD: Let me say, I have just as strong feelings as have been expressed --

THE COURT: This is not about strength of feelings. Please keep it to the merits so that I can make a ruling, please.

MR. GAYLORD: We sued Philip Morris Inc., and Philip Morris Companies Inc., in the original lawsuit in this case. I think their were promises of motions to dismiss and I don't -- I wasn't in the conversation, but we --

MR. COON: We stipulated to dismiss the holding company at the request of the defendant.

MR. GAYLORD: I think there was also request go discovery for some of this financial information.

MR. COON: I don't believe we requested

the balance sheet. Their response said they didn't have information in the form we asked for it in. There was not an offer to say, "Well, here is a balance sheet instead."

MR. GAYLORD: I just want to say we've been -- something has been referred to as a stipulation. It is not a stipulation. It is an offer to have us accept a terribly deflated value of this company.

THE COURT: Mr. Cofer talked about a stipulation in San Francisco, and that's what I understand Mr. Dumas was talking about, no body is inferring at this end that you have stipulated to a three billion dollar values, and it's obvious that the plaintiff contends that's not the value.

Now, Mr. Randles, let's make it a triad.

MR. RANDLES: I just want to make sure that the record is clear, what actually happened in this case originally was they sued Reynolds because they thought Reynold's made Marlboro. We cleared that up, we had a meeting. We told them, why -- I asked I believe it was Mr. Coon? "Why do you have two Philip Morris companies.

He said, "We want to make sure we got the

one that made Marlboro." I said, "Philip Morris Incorporated makes Marlboro. We're going to file a motion to dismiss the parent company, will you agree to that?"

He said, "Let me talk to my folks," they talked, they agreed. That's how we wound up where we are until the motions in limine, in which plaintiff's counsel filed a motion in limine. That's what that referred to.

THE COURT: Thank you, Mr. Randles. Plaintiff has established a prima facie case from which plaintiff is entitled to offer evidence of the financial condition of the defendant.

Plaintiff has a competent economist now testifying before jury. The economist may offer an opinion, under oath, what he believes the value of the company may be. And if that happens to be 17 billion dollars, then that s what the witness' opinion is.

The witness may support that opinion on direct, the profit and earnings ratio calculations that he described to me. It's up to the defendant to decide how far they want to go with that on cross.

The defendant may offer evidence of the other companies to the extent this gets into the calculation. In plaintiff has opened the door to Kraft and, I don't know, General Foods or whomever else. Then the door is open. I can't change that, but the fact of the matter is the plaintiff is entitled to offer evidence that the plaintiff believes is competent and the defense can cross-examine.

If profit earnings ratios of the Standard & Poor's 500, is not representative of Philip Morris Incorporated, there are ways to show that on cross-examination. And if the defense wants to go into discount it or litigation, that's the defenses' option -- Mr. Cofer, please.

MR. COFER: I apologize, I wasn't reacting --

THE COURT: You were reacting.

MR. COFER: I am not reacting to Your Honor's ruling; I am reacting to the position that we find ourselves in. There was a motion to exclude other litigation and that was ruled in this case, and a motion to exclude companies other that Philip Morris, and that's ruled in this case.

THE COURT: Let's stop there. They wanted the companies other than Philip Morris out for purposes of avoiding any bolstering. I am saying, you say the door is open, then go right through it. Bring in the evidence of Kraft if it is so important to you. Otherwise, it is not relevant for us to be spending time on.

MR. COFER: But my point is we had rules of this trial through plaintiff's case for three weeks.

THE COURT: I am telling you I am trying to apply those rules right now. What I've got is an admissibility issue. They get to offer evidence albeit the net worth of Philip Morris. That you disagree with it isn't my doing. I didn't make the facts, I doesn't make the evidence.

That you want to dispute their value is your right. That you want to do it in a way that introduces some evidence is also not my doing. I can't create the pattern. It is what it is.

If the witness is not credible because his opinion is entirely inflated because it

takes only a favorable look at profit earnings indexes, then that is something you point out on cross-examination, but I can't change the world.

We're here with what we're here with. And every plaintiff who gets to go on punitive damages gets to offer some evidence of financial condition. You don't like this witness' opinion, I understand that, but that doesn't make the opinion inadmissible.

MR. COFER: And I understand that, and I apologize if my reaction was perceived as being disrespectful to the Court. That is not what was intended.

Can I consult with my colleague for just one second?

THE COURT: Yes, sure.

(Pause in proceedings.)

MR. COFER: Thank you, Your Honor.

THE COURT: Is this anything else anybody wants to say and I'll try to get back to where I was.

MR. DUMAS: My last comment, Judge, I know you've been very patient. The box that I feel I'm in as a person who apparently is going to cross-examine this gentleman, is that in

order to really test his opinion, I have to go into the real valuation of Philip Morris companies.

THE COURT: Mr. Dumas, tell me this, please. Why is it that the defendant would allow to preclude a competent opinion on value? Because the defendant doesn't want the basis for the opinion to come in, why would that be the right application of the rule here?

Because that's what you're asking me to do. You're telling me that because the defense doesn't want to get into the bases of the witness's opinion, that the witness shouldn't be allowed to give the opinion.

MR. DUMAS: That's exactly what I'm saying.

THE COURT: And why is that reasonable when the opinion is competent based upon professional standards?

MR. DUMAS: Because when you are talking about punish damages, Your Honor, extraordinary damages to punish someone, you are talking fundamental fairness, and I believe, sincerely believe, that a defendant is entitled to go into under cross-examination the basis of someone's

on opinion obviously, but the box I'm in, Your Honor, is that to go down that road, will bring into evidence net worth and financial matters of Philip Morris companies, which I already explained to the Court will severely prejudice my client.

You can't unring the bell with this jury. And my last point is, to go down the road of price earnings ratio, I am going to have to go into litigation, the litigation that hangs over Philip Morris Incorporated, and that is a matter where the jury is going to go -- that's going to be prejudicial to my client because we're going to be talking about the threats of litigation, so I am in a box.

THE COURT: So what is it you're telling me that I should require the plaintiff to do? Put on opinion evidence they don't find credible? Put on opinion evidence with which they disagree fundamentally, as a matter of fact?

MR. DUMAS: I'm not asking for a whole bunch really.

THE COURT: What is it?

MR. DUMAS: All I'm asking is that this

Court issue an order that this expert, because of the fundamental fairness issue, issue an order precluding this witness from going farther than net worth.

Net worth, Your Honor, is 3.4 billion dollars. That is more than enough under this gentleman's argument to justify whatever amount of punitive damages they have asked for. To go beyond that is unnecessary and unfair, Your Honor, because I can't cross-examine on it. I don't think that's unfair to the plaintiff at all. It is a reasonable compromise.

THE COURT: Well, I will say that, you know, those who accuse others of being greedy often worry about getting into the same trouble. I am not the advocate here. It is not my decision to decide what evidence people want to put on. As I said in chambers this morning, I thought that to this point in the case, the record was very clean.

And while I appreciated the vigorous argument on both sides on the issues that have risen to argument, I am satisfied that, to this point, we've got a very clean record; that whatever happens is going to be sustained on

appeal, or I wouldn't be proceeding.

And I will say that I think the plaintiffs are playing with fire here, but that's not my choice, that's their choice. And for me to substitute my judgment for what is or isn't necessary for the plaintiff to prove their case is overstepping my rule.

I'm the judge. I am not the advocate. That it is uncomfortable for the defense that we're talking about punitives is understandable. I understand that. And I am -- I wish we weren't in this difficult posture.

But the fact that the evidence is prejudicial is it's whole point. The fact that the plaintiff want to prove to the jury that Philip Morris Incorporated has a value of 17 bills dollars, when the defense wants plaintiff to stipulate that it's three is an issue of degree.

Do I think they need it? It doesn't matter except to the extent it's an unfair prejudicial issue because the substitute evidence is really what's there. But when we're talking about how much does it take, it's not my judgment that gets before the jury.

It is the plaintiff's prerogative to offer evidence that supports their claim. We have a competent witness on the stand who is entitled to give an opinion to the extent his opinion is based upon a Standard & Poor's profit earnings times income there is nothing inadmissible, and the witness may testify to that.

To the extent the defense opens into the values of other companies, then we may see more from the plaintiff on direct, but on the question of may the witness offer an opinion, which we previewed, there the witness is qualified and competent, and if plaintiff proffers it, he may offer that opinion.

The fact that it's supported by a matter that is outside the record is contemplated by the rules. And that's always the cross-examiner's peril. That's the way the Rules of Evidence were developed. That a lot could have happened before today to bring this up in a more predictable way is more than obvious, and that's probably true on both sides.

I did not see this coming, you all did, but we're here now. The witness may testify as

I indicated. Because of that, there is going to be an explanation about the 17 billion dollar number before jury, one that is admissible. And therefore, the motion for mistrial would be moot in the context of the evidence the jury is going to hear.

Is this anything else? Bring in the jury, please.

(Whereupon, the following proceedings were held in open court, the jury being present at 2:00 p.m.:)

THE COURT: Good afternoon, jurors.

Mr. Thomas.

MR. THOMAS: Your Honor, Mrs. Williams has a doctor's appointment this afternoon, so she will not be with us for the remainder of the afternoon.

THE COURT: Thank you. Proceed.

LOWELL BASSETT

Was thereupon called as a witness on behalf of the Plaintiff and, having been first previously sworn, was examined and testified as follows:

FURTHER DIRECT EXAMINATION

BY MR. THOMAS:

Q. Dr. Bassett, could you come back down to the screen, and let's get refocused on where we were before the lunch break.

Did I ask you to examine data relating to the answer to the question number six, the financial condition of the defendant, Philip Morris Inc.?

A. Yes, you did.

Q. And did you conduct such a calculation using a formula that is used by other professionals in the field of economics, stockbrokers, financial advisors, investors, financial analysts and others who are attempting to determine the financial condition of companies?

A. I did.

Q. And was the method that you used the most accurate method that you could think of for valuing the financial condition of this defendant in evidence before this jury in this case?

A. Yes, it was.

Q. Now, I think we touched on it before, but I just want to make sure. In term terms of the

conservatism of this figure, did you factor out of that calculation, any premium, in other words, additional money that somebody might pay in order to obtain or to purchase Philip Morris Inc.?
A. I did. The so called control premium is not included.
Q. All right. And in regard to what the conclusion was as far as that financial condition, what is that figure?
A. 17 billion dollars approximately.
Q. Are there other ways to also calculate financial condition or is there at least one other way to calculate financial condition?
A. Well, financial condition is a pretty broad term, so you are not only could talk about what the net worth of somebody is, but you could also talk about what their profit was, which we did earlier this morning when we talked about the 1.7 million dollars that was earned in 1997, or the figures over two billion in some previous years, so that would be the flow of income.
So if you compared it to a person that's sort of what you would have left over after your expenses each year, as opposed to a measure like this, says, what is my net worth, what is the

stock of wealth that I own.
So for your one way of net worth, for most of us it's tied up largely in our houses, so if my house is worth $200,000, and I had a $100,000 mortgage, my net worth in my house is $100,000. I could sell the house, and I would have $100,000.
Whereas, if I look at what I might have left over at the end of each year after I paid my expenses, maybe I would have two or three thousand dollars, left over in that year that I might save or invest. So one is looking at it from an annual basis; the other is looking at what am I actually worth today.
Q. And just because we've been looking at different figures, was the year for number three, 1997?
A. Yes. This was the year in which Mr. Williams died, and so that is the year that was used there.
Q. And in regard to the financial condition, the 17 billion dollar figure, is that as of March 1999?
A. Well, I think in the context of the Court's ruling, we probably should push that back

to the end of 1998, rather than making it March of 1999.
Q. If you were to push it back to the end of 1998, would the factor or the net worth financial condition be appreciably different?
A. Well, I think when I recalculated it, it was about 500 million dollars more, so it was about 17 billion 500 million, but in the scope of things, that is not a huge difference. We're not talk about a number that is precise down to the dollar, when we're talking about a general figure.
THE COURT: Ms. Smith.
JUROR SMITH: I am totally confused. Is this cash net worth or is this --
THE COURT: You are going to need to listen to the evidence.
JUROR SMITH: Okay.
THE COURT: It's all right.
BY MR. THOMAS:
Q. In terms of what this figure represents, is this figure the financial condition of Philip Morris, not how much cash they have in a savings account, but the financial condition taking into account the fact that they're a going concern with a substantial business with the Marlboro brand

name, with -- an operating concern?
A. Right. In economic terms. What your net worth represent is the present value of your future evenings, so what the market is saying about the company's future earnings reduced to a present cash value.
Present cash value means that you take earnings that are in the future and you discount them for the fact that they are in the future, so when you add up what your earnings are this year, you might take the full earnings, but next year's earnings, you have to take into account that it's next year.
And if I had some money today, I could invest it in something else and earn interest between now and next year, so if I say I'm going to earn two billion this year and I'm going to earn two billion next year, when I add in next year, I don't get the full two billion dollars. I have to take something less than that because of the interest that can be earned.
So if you pick something like ten percent as an interest rate, and you reduce two billion by that ten percent for the time value of money, it's would be a little over 1.8 billion as being the

present value of next year's two billion, and then the third year, you have to reduce it more, and the fourth year.

And so you add up all those expectations of future earnings of the company, and that is what the value is representing.

MR. DUMAS: Objection, Your Honor, move to strike that. It is not relevant to the financial condition, dependent on future earnings.

THE COURT: Objection sustained. Jurors disregard the last question and answer.

BY MR. THOMAS:

Q. In regard to -- as a hypothetical matter, if a person came into a financial analyst, and said, "I would like to know what the financial condition of Philip Morris Inc. is," and you were the financial advisor in that circumstances, would it be an accurate answer to only take the amount of money that Philip Morris Inc. had in the bank in providing the financial condition to that person seeking value?

A. No.

Q. Would it be necessary to take into account the value of Philip Morris Inc. as an

ongoing business?
A. Yes.
Q. Is that what you did in your calculation that resulted in the 17 billion dollar financial net worth number through put on the board?
A. Yes, it is.
MR. THOMAS: Now, in regard do that number, I will mark it and its sheet as Exhibit 173, and for demonstrative purposes, move to admit, subject to the objections that we have previously heard.
MR. DUMAS: Yes, Your Honor, subject to those objections.
THE COURT: Thank you.
Proceed.
BY MR. THOMAS:
Q. Now, I would like to go to what I am going to identify from the outset, is Plaintiff's Exhibit 174, and I am going to ask you to create a new chart for the jury to give us an understanding of figures relating to financial condition on a different level.
Did I ask you to determine what the average income and net worth is for working people in the United States?

A. Yes, you did.
Q. And what -- and please put it on the board, what would is the average income of a high school graduate in the United States at this time?
MR. DUMAS: Objection, relevance, Your Honor.
THE COURT: Objection sustained.
BY MR. THOMAS:
Q. Would it be helpful in explaining the concept of net worth of a corporation to show the factors that are involved in net worth on a smaller level such as for an individual.
THE COURT: Mr. Thomas, would you approach, please.
(Sidebar conference between Court and counsel, off the record.)
BY MR. THOMAS:
Q. In regard to the diagrams that you have created for us, the figures that you've presented including the net worth, the profitability, the share of this defendant, are these all figures based upon opinions that you hold to a reasonable degree of economic probability?
A. Yes, they are.

MR. THOMAS: Thank you.
THE COURT: Dr. Bassett, would you mind taking the witness stand again.
And we are going to need to create a line of sight, Mr. Dumas. Are you going to need these charts over here?
MR. DUMAS: I will, Your Honor.
THE COURT: Do you want the witness here or there?
MR. DUMAS: For the moment, right there, thank you.
THE COURT: You need to move the chart.
Go ahead, Mr. Dumas.
MR. DUMAS: I am looking for an exhibit.
THE COURT: Never mind.

CROSS-EXAMINATION

BY MR. DUMAS:
Q. Dr. Bassett, you are not an accountant; is that correct?
A. That is correct.
Q. You do not prepare audited balance sheets for corporations?
A. I do not.

Q. Your consultive work, is that primarily forensic?
A. Yes, it is.
Q. And by that, Doctor, forensic work means that your clients are not businesses or corporations generally, but rather attorneys. You are retained by attorneys to perform analysis for litigation primarily purposes, correct?
A. That is correct, but the attorneys frequently represent corporations.
Q. Doctor, isn't it's true that the most common basis by which accountants, certified public accountants, in this country, use to quantify the financial condition of a corporate entity is what accountants call net worth?
A. Yes.
Q. And isn't it true that certified public accountants, in order to reach net worth, as established by generally accepted accounting principles, utilize a balance sheet approach?
A. Yes.
Q. Explain for the jury what a balance sheet is.
A. A balance sheet would list the assets that the company owns based on the prices that

they paid for those assets, so, for instance, if you bought a piece of equipment for $10,000, that would go on the balance sheet as an asset valued at $10,000, so each thing that the company has bought that hasn't been used up is listed.

And then the liabilities would be the amounts that the company owes, so they might have some accounts payable, they would have money that they borrowed perhaps from the bank or they could have bonds that represent IOUs to bond holders, and they list those liabilities. They subtract the assets -- excuse me, the liabilities from the assets to arrive at what's called book net worth, or book value.

Q. And when a corporation needs financing and it goes to, a large lending institution in an attempt to acquire a large loan for major capital improvements, the lending institution would want an audited balance sheet, an audited financial statement prepared by a certified public accountant, that in all likelihood, if not in all probability, the method by which the balance sheet or the financial sheet or the financial statement would be prepared would be pursuant to general accounting principles?

A. Certainly that would be a start. The bank would want that before they would do anything else, but that wouldn't be the only thing that the bank would look at.
Q. The bank would want an audited balance sheet prepared in general form as you have just outlined, correct?
A. Correct.
Q. Doctor, you testified that when you're retained by counsel, you reviewed some material, correct?
A. Correct.
Q. Okay. Did you review a balance sheet of Philip Morris Incorporated, yes or no?
A. No.
Q. Did you request a balance sheet of Philip Morris Incorporated?
A. I requested whatever information counsel had.
Q. Okay. Did counsel advise you that Philip Morris Incorporated has a balance sheet three billion four hundred and thirteen million six hundred thousand?
A. No.
Q. You weren't aware of that when you gave

your opinion of 17 billion, here you?
A. Well, I was aware of it because you have been discussing it while I was here in court, but I wasn't aware of it when I prepared my opinion as to the market value.
Q. And are you aware that Philip Morris Incorporated has publicly announced its balance sheet as of the end of the year 1998 of being three billion four hundred and thirteen million six hundred thousand?
A. No, but I'm not surprised.
Q. Now, Doctor, when an economist or accountant gives an opinion regarding net worth, particularly current net worth, isn't it generally true that the accountant will attempt to utilize the most current financial information available?
A. The accountant will, yes.
Q. And in reaching your opinion here today, Doctor, did you review the most current financial information of Philip Morris Incorporated?
A. I reviewed the most up to date that I could find.
Q. And what was that doctor?
A. I reviewed the information that was available on the corporation web site on the

Internet.
Q. And what was the most current information that you had to available to you, Doctor?
A. 1998.
Q. Year end?
A. Yes.
Q. All right. Plaintiff's Exhibit 171.
Doctor, you listed net profit of Philip Morris Incorporated for 1997 of one billion six hundred seven million dollars, correct?
A. Correct.
Q. What was the net profit of Philip Morris Incorporated as of year end 1998?
A. Approximately four billion dollars.
Q. Doctor, isn't it's true that the 1998 earnings of Philip Morris Incorporated is seven hundred six million dollars?
A. That's after extraordinary charges.
Q. Doctor, we don't need to get into the nature of extraordinary charges. The fact of the matter is the reported earnings of Philip Morris Incorporated year end 1998 is seven hundred six million dollars, correct?
A. Only after extraordinary charges.
Q. You so testified a few moments ago in a

hearing outside the presence of the jury, correct?
A. Correct, after the extraordinary charges, it's about seven hundred million dollars.
Q. The earnings of Philip Morris Incorporated in 1998 were less than half of the earnings in 1997, correct, Doctor?
A. Only because of those extra charges that we're talking about.
Q. Those charges were real, weren't they, Doctor?
A. Well, they're accrued charged. They're not cash charges if that's what you mean.
Q. Now, Doctor, correct me if I am wrong, you utilized, in response to Mr. Thomas' -- one of his last questions, that the 17 billion reflects the, quote, value of Philip Morris Incorporated as an ongoing business, correct?
A. Correct.
Q. What, in essence, you're talking about Doctor, is the market value of Philip Morris Incorporated?
A. Yes, I am.
Q. All right. Which in simple, general terms, is what, in your opinion, Philip Morris Incorporated might gather on the open market if it

was sold, correct?
A. Correct.
Q. Okay. Philip Morris Incorporated does not have assets 17 billion dollars, does it?
A. Oh, assets are larger than 17 billion.
Q. After liabilities, Doctor?
A. No. But you asked about assets, not about after liabilities.
Q. Net assets, Doctor.
A. Net worth on the books is about what you said, three billion dollars.
Q. All right. In terms of providing some helpful information to these ladies and gentlemen of the jury, in terms of determining the actual financial condition of Philip Morris Incorporated, you get to the 17 billion dollars, only if Philip Morris Incorporated is sold, correct, Doctor?
A. No. I mean, that's what you could get if it was sold, but you don't have to sell it to access some of that value.
Q. Philip Morris Incorporated is not sold, is it, Doctor?
A. No but they can borrow against the value that they have. It is not any different than if I own stock and it's worth $17,000. I wouldn't just

take the price that I paid for it, I would look for what the current market says it's worth.
Q. 17 billion dollars, in fact, Doctor, is about a factor of five times the actual net worth of Philip Morris Incorporated, isn't it?
A. No, because I believe 17 billion is the actual net worth. The book value decided by accountants does not reflect the value of the brands and the income that those brands produced for the company.
Q. And those valuations could be obtained only if the company was really, in essence, sold?
A. No. You could borrow against that value.
MR. DUMAS: That's all I have Doctor.
THE COURT: Redirect.
MR. THOMAS: Thank you, Judge.

REDIRECT EXAMINATION

BY MR. THOMAS:
Q. Is there an example that we can use to illustrate how -- what an accountant puts on a balance sheet and what the financial condition of a company, how they're different?
A. Well, I think the best example is a

personal example. If an accountant was looking at your historical personal financial data as an accountant looks at a company, if you bought a house for $100,000, 20 years ago, the accountant would have it on the balance sheet as having a value of $100,000.

But if your house has appreciated as it frequently has in both Portland and Seattle, it may well be worth $300,000 today, and that is not going to be reflected in historical data on the balance sheet, so you could have a mortgage of $50,000, and the accountant would have $50,000 as a liability, and $100,000 as the historical cost of your house, and your net worth would be $50,000; but in actually, your house is worth $300,000, you have a $50,000 mortgage, and your net worth is $250,000.

Q. Is it fair, in terms of evaluating the real financial condition of a company or an individual, to limit value to what somebody may have paid for, something 10, 20 years ago, without taking into account what it's really worth now in 1999?

A. I don't believe so.

Q. And in light of what the lawyer for

Philip Morris told you in regard to what the accounting balance sheet total is for Philip Morris Inc. in 1998, does that change your opinion about the true financial condition of this defendant?

A. No.

MR. THOMAS: Nothing further.

THE COURT: Thank you, sir, you may step down.

Mr. Thomas.

MR. THOMAS: Your Honor, that concludes the evidence that the plaintiff will be presenting in this case in its case in chief; however, there May be some clerical things that relate to the exhibits in terms of having failed to remember to introduce them that we will want to look at after the conclusion of the day's proceedings, so, Your Honor, the plaintiff rests its case.

THE COURT: Thank you, Mr. Thomas.

Jurors, let me do this, I can see you all better this way. I need to work with the lawyers for the rest of the afternoon. I am going to be excusing you until tomorrow at 9 o'clock. You have now heard all the evidence

in support of the plaintiff's case in chief.

When you come back tomorrow, we'll start with the defendant's case, and by the end of the day tomorrow I'll have a prediction for you about when we think the case will be in your hands, so I want to thank you for your attention today. Leave your notes here.

9 o'clock tomorrow morning, enjoy the sunshine. We'll be here.

(Whereupon, the following proceedings were held in open court, out of the presence of the jury:)

THE COURT: Do you all need a time out or are we all ready to go?

MR. THOMAS: We need our lawyer, but we have to get him in here.

THE COURT: Please go get him. Please expedite.

MR. RANDLES: Your Honor, would it be possible for us to get into the courtroom at 8:30 in the morning to set up material for our first witness?

THE COURT: Sure.

Katie, this is Mr. Fraser.

THE COURT REPORTER: Could you spell your name for me, please.
MR. FRASER: F-r-a-s-e-r, John.
THE COURT: All right. Are we ready to proceed on the defendant's motions?
MR. RANDLES: The defense is ready.
THE COURT: Plaintiff?
MR. COON: Ready for the plaintiff, Your Honor.
THE COURT: Okay. Mr. Randles.
MR. RANDLES: May it please the Court, Your Honor. Philip Morris moves for a directed verdict now at the close of plaintiff's case on several grounds, and if it pleases the Court, I'll just start with the first ground, make my argument, and once we're finished, move on,
THE COURT: That would be most helpful, thank you.
MR. RANDLES: Your Honor, the first ground is what I will refer to as medical causation, slash, statute of repose. And here is the issue, Your Honor, and forgive me for being a little repetitive, but I want to make sure the record is clear.
This Court has entered a stipulated order

in this case based on the Oregon statute on ultimate response. In pertinent part that order reads, "Any and all claims for injuries or death allegedly caused by cigarettes purchased before September 1998 are here by dismissed."

Your Honor, the evidence in the case to date demonstrates the plaintiff has not met their burden of establishing medical causation, i.e., causation of Mr. Williams' lung cancer, after September 1st of 1988.

As our motion indicates, it is true that both of there medical witnesses, Dr. Kern and Dr. Segal, used the language, "substantial contributing factor" as to the post-1988 smoking, but when you look at the testimony on cross-examination, both were asked this question and gave this answer.

"If Mr. Williams had not smoked any cigarettes other than the cigarettes he smoked from September 1st, 1988 forward, would he have got lung cancer?" And they both answered, "Probably not."

Now, Your Honor, that is very significant because any and all claims for injuries based on pre-'88 or death allegedly caused by cigarettes

purchased before September 1988 are dismissed. Now, "caused by" means the same thing as it means for their case in chief, which is substantial factor.

And what it means is this, under this order and the law of the statute of repose of the state of Oregon, the cigarettes purchased before September 1st, 1998, and consumed by Mr. Williams, cannot be stacked with his subsequent smoking history.

In other words, there can be no claim based upon any injuries that he received as a result of smoking cigarettes before 1988. Now, the testimony in this case is also clear that the usual latency period for lung cancer, I believe Dr. Burns said it and I believe both of there medical witnesses said it, is 20 to 25 years.

According to the testimony offered in this case, Mr. Williams smoked for 38 years before September 1 of 1988. In other words, he has a smoking history from about 1950 to about end of August 1988.

According to the medical testimony in this case, that would for the average smoker be

sufficient to cause lung cancer in and of itself, but that history cannot be considered for causation, because, if so, the statute of repose is rendered a nullity.

Only the cigarette smoking from September 1st, 1988 forward, can be considered as a causative factor of his cancer, not the prior smoking; in order words, you can't stack the periods from '88 forward on top of the smoking before pre-'88 to get over the causation hurdle.

You have to set aside that pre-1988 smoking. That hasn't been done in this case. The unconverted evidence from their own witnesses is that if Mr. Williams had only smoked what September 1st, 1988 period until the time of his death, he probably would not have got his lung cancer. Thus, there is a failure of proof based on the repose period and defendants are entitled to a directed verdict.

THE COURT: Before you address this, Mr. Coon, I have a question of Mr. Randles.

Your analysis assumes a singular cause, and I would like you to address the notion which in the light most favorable to the plaintiff, I think a rational juror might be considering and

that is the smoking both before and after September 1, 1988, contributed to in a way that is a legal cause of Mr. Williams' death.

And the analogy I want to draw is to case Mr. Beattie is probably familiar with, we struggled with the issue of causation in the Purcell case. The causation evidence had more to do with exposure to whose asbestos.

It wasn't a time-sensitive process, but it was an issue where that claimant had been exposed to a variety of asbestos sources, and a witness opined that one exposure -- it's a little different than the theories in this case -- that witness opined that one exposure to asbestos was enough to be a substantial factor in the cause of contracting mesothelioma, even through there were exposures to other defendants' products, other defendants' asbestos.

As I understand the Court of Appeals opinion, the Court affirmed, concluding it was not error to submit to the jury the question whether the asbestos of the two defendants in that case were substantial factors in the causing plaintiff's harm.

It seems to me that your argument addresses only the notion of a complete and total explanation, the plaintiff's cancer, and what plaintiff has been proceeding on is a multiple causation theory, which is to say, as of September 1, 1988, you take the plaintiff as you find him.

There is an exposure that goes from September 1, 1988, to the date of his death in 1997, to your client's products which were purchased after September 1, 1988. There is medical testimony that that smoking, the post-1988 smoking was a substantial factor in the cause of his contracting his lung cancer.

That it isn't the only cause isn't dispositive, and I don't think the law requires that plaintiffs prove that only smoking after September 1, 1988, caused his cancer. They simply have to show in the light most favorable to their theories that a rational trier of fact could conclude that smoking after September 1, 1988, was a factor in the cause of his cancer and death. So talk to me about multiple causation.

MR. RANDLES: May I use this, Your Honor?

THE COURT: Of course.
MR. RANDLES: Can you see this, Your Honor?
THE COURT: Yes.
MR. RANDLES: If I may, let me say this is the 1988 line here and this will be pre-'88, and this will be 1988, forward.
THE COURT: Yes.
MR. RANDLES: We are talking about cigarettes, first, as a cause, from September 1, 1988 forward, more specifically Marlboro. Now, there might be other factors during this time period, of course, that could contribute, as the witnesses said, perhaps a family history. Perhaps chemicals, perhaps something else.
Within this period, it's clear that if my client's product is one of substantial contributing causes, plaintiff goes to the jury. Likewise, if these factors are contributing factors or play a role in the causation, family history and chemicals, pre-1988, they still can be considered and that still doesn't get my client off the hook.
But what cannot be considered is this right here, the pre-'88 smoking history. That

cannot be considered. And Your Honor, if that is not considered, their own witnesses say, if he had only smoked with for this period of time and had not smoked for this period of time, he probably would not have gotten lung cancer.

THE COURT: Okay. Mr. Randles, I would say, if that's the standard, and the only evidence that the jury can consider is smoking evidence after September 1, 1988, and they have to assume that the plaintiff was born that day, and can't consider any other factor in his life, then your theory would succeed; but that's not life and that is not the law of taking the plaintiff as you find them.

By analogy, a person can get hit by a car out on the street, and preexisting that person's physical condition on that day is something that makes that person the proverbial eggshell, right?

MR. RANDLES: Yes, Your Honor.

THE COURT: His smoking pre-1988 may have made him an eggshell, may have made him more susceptible to the lung cancer in the light most favorable to the plaintiff, was diagnosed in 1996, and was caused by his cigarette smoking.

That we tell the jury they cannot award damages for injuries sustained pre-1988 addresses your concern, but there is nothing in the law that suggests the plaintiff's condition has to be caused solely by the conduct after September 1, 1988; the law simply allows plaintiff to recover only for that which is.

So we have the Mr. Williams, the human being, who starts smoking in the '50s. He acquires -- I continues to smoke for, you say, 38 years until 1988, and it is that person, the 38-year-history-of-smoking person, who on September 1, 1988, continues smoking.

And it is only for the continuation, only for the cigarettes purchased after September 1, 1988, for which there is evidence those cigarettes caused him harm that the plaintiff may recover, but unless you can show me a case that says you have to have a pure, newly-born plaintiff on September 1, 1988, and it's only those exposures that occurred thereafter that count; and that the fact that he may have been susceptible to cancer beforehand, because of his long history of smoking, the fact that he cannot be compensated for that, is obvious.

MR. RANDLES: If I may, Your Honor. I understand the eggshell plaintiff notion, and what I am saying is the statute of repose carves a chunk of that general tort principle out.

THE COURT: But the statute of repose simply says the plaintiff can recover only from the product sold after our date, and you're focusing on a negative as opposed to the positive. The statute is written in positive terms. And so long as the jury is limited to injuries incurred by the plaintiff after September 1, 1988, and told they can't recover for injuries incurred before September 1, 1988, and so long as a competent professional says, "I believe the smoking after September 1, 1988, was a substantial factor, there is a prima facie case of medical causation.

MR. RANDLES: If I may make sure I am being completely clear, I want to make sure I'm clear, Your Honor. The order in this case says --

THE COURT: All right, let me stop you there. I'm tired of hearing the order in this case, because if you're misinterpreting my ruling, then I am going to change it right now.

You are taking words out of context, Mr. Randles.

I dismissed those claims for exposure that arose before September 1, 1988, because the statute of ultimate repose doesn't allow plaintiff to recover for exposures occurring before that time. I did not mean to suggest by granting your motion that the plaintiffs could not proceed for exposures that occurred after September 1, 1988, no more, no less.

If you want to rely on the way you framed the order to try to box the Court into a law of the case kind of analysis, then I need to correct the record, because that is not what my order was intended to mean. My order was intended to mean they get no damages for anything that occurred before September 1, 1988; it's only for exposures that occur after that they're allowed to proceed.

MR. RANDLES: I believe the order accurately reflects the statute, but I am not relying on any trickery here or any slight of hand. This was a stipulated order.

But Your Honor, the point I am making is precisely the point that the Court was making.

Injuries for death. The testimony in this case, which they offered in exhaustive detail from Dr. Burns says that when you get start smoking the get damage to the lungs. The cilia is damaged. The cells are damaged. There is DNA damage and eventually you get lung cancer.

Dr. Burns testified and their witnesses testified that the average latency period for lung cancer is 20 to 25 years. Mr. Williams had a 38-year smoking history before the date of repose. My argument is precisely that that pre-smoking history and the damages caused by it can't be stacked with the post-'88 smoking history.

THE COURT: And I'm not suggesting that it can be stacked. What I'm saying is that the plaintiff can go to the jury for exposures that occurred from September 1, 1988, forward to the extent there is competent expert testimony that links that exposure as a factor, not the sole fact, but a factor in the cause of plaintiff's harm.

The statute is 30.900 -- excuse me, 30.905, and it says that, "A product liability civil action," which this is, "shall be

commenced not later than eight years after the date in which the product was first purchased for use and consumption."

This is a product that was purchased many, many, many, many times, so every one of those purchases after September 1, 1988, is a theoretical trigger under the statute of ultimate repose. What happened before happened before. The plaintiff gets to recover no damages for that.

But I know of nothing in the law that says plaintiff has to have only post-'88 exposure as being the sole medical cause for cancer. Because that's not what the statute says. Now, do you have any analysis from any jurisdiction that suggests that's the application that ought to apply?

MR. RANDLES: Not precisely on point, Your Honor. I am troubled I am not being clear, though. I am not saying it has to be the sole cause. That's not my argument.

THE COURT: I understand your chart up here. You're saying that unless the plaintiff can show that only the smoking after September 1, 1988 was the smoking damage that caused his

death, then they can't go to the jury, and I don't understand that to be the law of Oregon.

I am stating it in a positive form and you're stating in a limiting form. What I am saying is that the statute limits plaintiff's recovery only to those exposures within the time period for which there is a medical causal link, and the testimony is there.

I just don't think the statute is to be read in the negative exclusionary way your suggesting unless there is some authority that I don't know about.

MR. RANDLES: No, I don't think there is, Your Honor. I think you and I just perhaps have a different view of what is required. I understand the Court's ruling, and I would suggest moving onto my second ground.

THE COURT: I think it's preserved.

Is there anything, Mr. Coon, you want to add?

MR. COON: This is a sole cause argument. The standard is substantial factor. We have nothing to further to add.

THE COURT: Okay. Let's go to the next one. I think it's an analogous argument, isn't

it?

MR. RANDLES: Hopefully, this one is easier. This has a two-step analysis. This is addiction. Plaintiff claims addiction is an injury in this case. They must, because that is the basis of their strict liability claim.

And I don't want to bore the Court, but I think for the record I need to make clear, we filed a comment on the motion, comment restatement of torts 402 (a). We made the argument that ordinary cigarettes are not defective or unreasonably dangerous because they may cause lung cancer.

Plaintiffs, in response to that, and I don't want to overstate, but the Court's indication that we were on at least the right track there, amended their complaint, and now the fourth amended complaint, which is there products liability claim, is purely an addiction count.

It is that cigarettes were defective in design, and unreasonably dangerous, because defendant added ammonia to increase the effects of nicotine. That Paragraph 8-A.

Paragraph 8-B is defendant altered the pH

of cigarettes to increase the effect of nicotine. C, defendant controlled and manipulated the amount of nicotine to maintain physical dependence. And D, defendant added sugars to its cigarette tobaccos to increase the effect of nicotine.

We, likewise, have several of those same allegations in the negligence count. Plaintiff has failed to offer evidence establishing causation of addiction after September 1st of 1988.

THE COURT: Where is addiction a necessary predicate to this theory? Because let me just tell you what I'm thinking and tell me why I am missing your point.

There was all this effort to keep out of the case opinions about the biochemistry of the ammonia evidence, how it increases the impact or the effect of nicotine. And in the pleading to which you just referred, doesn't use the word "addicted." It talks about the effect or the impact of nicotine.

The defense never took the position that Dr. Benowitz and Dr. Ferone, is it? Ferone could not talk about increased impact or

increased effect. What the defense took the position about was that they could explain biochemistry of it as an element of addiction.

The plaintiffs pleaded a theory of increased nicotine impact, and has offered evidence in support of a theory of increased nicotine impact without having to explain or explaining a biochemistry connected to addiction.

So I don't see, first of all, as a matter of preliminary foundation to your motion that plaintiff is relying on a contention, as a matter of unnecessary element, that Mr. Williams was addicted, and then the addiction had to happen before September 1, 1988.

What they're saying is that the product is defective and unreasonably dangerous because it was manipulated in a way to increase nicotine impact or nicotine effect, the response to which increased smoker usage of the product. I think that's what they're saying. Now, I don't read addiction as a premise, or an elemental piece of that.

MR. RANDLES: Well, Your Honor, this strict liability claim has to have a link of

harm to Mr. Williams. There is no testimony in the case, and, indeed, there is no scientific evidence anywhere that either nicotine or any of these components increase the risk of lung cancer, so the injury from which Mr. Williams died, there is no evidence in the case and no evidence anywhere that I know of, that any of these alleged defects spelled out here in the product increase the risk of lung cancer.

THE COURT: Let me again talk to you as someone who heard the evidence not inclined one way or the other, but now looking at it in the light most favorable to the plaintiff, the evidence of the increased impact of nicotine, if believed, by the plaintiff, tends to show that a person like Mr. Williams, and, indeed, Mr. Williams, continued smoking for the 38 years leading up to September 1, 1988, and the seven years thereafter until he died, for the nicotine impact.

And it was -- it is not the nicotine that caused the cancer, it was the smoking that caused the cancer, according to the evidence in the light most favorable to the plaintiff, so the causation link is provided by the act of

smoking continued exposure to cigarette smoke inhaled into the lung, not a requirement that elementally plaintiff has to show that he was addicted, although the jury may infer that from the evidence, but I don't see what this claim is dependent upon a finding of addiction.

What the claim is dependet upon is that there was something other than pure ordinary tobacco, which may made the product defective and unreasonably dangerous, and when measured from the expectation of an ordinary consumer, who might not have expected that the product would have an additional impact or effect because of the chemistry of how the cigarette was processed, that seems to be what the plaintiff is pleading here and what plaintiff has been proving, so I don't see how addiction, your motion on addiction, tells me anything.

MR. RANDLES: Respectfully, Your Honor, Dr. Benowitz testified for a day and half about addiction.

THE COURT: Well, I'm not saying claimant was addicted. I'm saying that I don't see it as a fundamental element of their claim for strict liability on which you are now telling me to

grant a directed verdict because his addiction, if it occurred, happened outside the time period. That's what you're asking me to do, right?

MR. RANDLES: Well, perhaps I should break it down. Dr. Benowitz testified that he thought that he thought that nicotine was highly addictive, a highly addictive substance, as used by the ordinary smoker, they are addicted to nicotine in cigarettes, and that is the primary reason they continue smoking. His testimony was clear on that.

Likewise, plaintiff has introduced one document after another, William Dunn and others, nicotine is the primary reason people smoke, and people were addicted to nicotine. Nowhere in the case, Your Honor, respectfully, have plaintiff's counsel or plaintiff's witnesses drawn a distinction between nicotine and addiction. They've embraced them.

And the reason they pleaded in this first count, pH, is to increase the effect of nicotine. The effect of nicotine is to keep people addicted.

THE COURT: Mr. Randles, I ruled in your

client's favor on the issue of addiction and pH. What the jury heard was that the pH factor, that pH evidence was limited only to impact or effect the subjective response that the smoker has.

And all I'm saying is, reading the plaintiff's complaint, the fourth amended complaint, as to strict liability, and looking at the evidence about injury from September 1, 1988, to now, which is what I am thinking you want me to do, I don't see that a fundamental premise of the plaintiff's strict liability claim is that they have to prove that he became addicted after September 1, 1988, and that seems to me what I am reading in your addiction ultimate repose motion.

MR. RANDLES: If I may, Your Honor, I am taken completely a back by that reading. If I may refer you to Paragraph 11, for example, in the negligence claim --

THE COURT: Well, we're not on the negligence claim. I thought you were talking about the strict liability claim when you were reading to me about the specifications of the strict liability claim.

MR. RANDLES: Well, I mentioned, when I

started, I made the same allegations in the negligence claim, and in the negligence claim they say, one of the reasons we were negligent, 11-B, in processing, controlling and manipulating the contents and proportions of various substance in cigarettes in such a way as to continue and/or enhance the habit-forming and/or addictive effects of those products on users specifically by, and then we do the ammonia, pH --

THE COURT: Let me just interrupt, so that I am not being misunderstood. To the extent your motion asks me to dismiss their complaint because there is no evidence to indicate that he became addicted after September 1, 1988, the motion is denied, because I don't see that plaintiff seeks to prove that he became addicted after September 1, 1988.

The addiction evidence came in in large part as evidence of the defendant's mental state about what the defendant was doing when it marketed the cigarettes and it formulated the cigarettes.

It came in to prove why the plaintiff couldn't stop smoking, but addiction is not an

element of the plaintiff's strict product liability claim. The strict product liability claim is based upon the specifications set forth in Paragraph 8, none of which plead addiction, and they didn't try to prove addiction through the expert witnesses.

MR. RANDLES: Well, as I said, Your Honor, I don't -- I never considered that reading. But can we have an instruction to the jury that Count 1 is not an addiction count?

THE COURT: What is your motion? Isn't it to dismiss this because there is no evidence of addiction after September 1, 1988?

MR. RANDLES: Yes, Your Honor.

THE COURT: That motion is denied for the reasons I've said, because the plaintiffs don't plead and their claim does not depend upon proving addiction after September 1, 1988. It depends upon proving smoking an unreasonably dangerous product in the specifications set forth after September 1, 1988, in a way that was a substantial factor in causing harm to the plaintiff.

It doesn't rule out that he got addicted way long ago, just like we talked about in the

previous motion about exposures to cigarette smoking pre-September 1, 1988.

MR. RANDLES: Could I discuss my motion with respect to negligence?

THE COURT: Well, sure, but if it's the same argument that they have to prove addiction after September 1, 1988, you are still not telling me what part of the plaintiff's claim assumes that burden.

MR. RANDLES: Well, I haven't finished my thought. Let me finish my thought and see if I can do better, Your Honor.

Plaintiff's only expert on addiction, Dr. Benowitz, testified that, in his opinion, Mr. Williams became addicted to cigarettes sometime within three years of when he started smoking, which would have been it the early 1950s.

Mrs. Williams testified that contrary to the allegations in the complaint, Mr. Williams did not start smoking Marlboros in 1950s, she testified it was after that. So according to the evidence in this case, plaintiff's evidence, Mr. Williams became addicted to cigarettes before, about seven or eight years, give or

take, before he ever picked up his first Marlboro cigarette.

There is no causation to my client causing addiction; in other words, no conduct by my client caused Mr. Williams to become addicted. He was addicted long before he ever picked up the first Marlboro cigarette. If addiction is an injury, then that tort was done. That tort was completed before he picked up my client's first cigarette.

The statute of repose issue is the same issue, and I don't want to cover ground that the Court has already decided above, but my client did not addict Mr. Williams after September 1st, 1988.

THE COURT: Again, Mr. Randles, I don't see the plaintiff is suing for addicting Mr. Williams after September 1, 1988. The plaintiff is alleging that after September 1, 1988, Mr. Williams was exposed repeatedly to a defective and unreasonably dangerous product, as specified in Paragraph 8, that that exposure was a substantial factor in causing his lung cancer.

MR. RANDLES: Your Honor, there has been no evidence that the addiction or addictiveness

or habit-forming nature or any of these factors underneath 11-B that they say caused him to become more addicted played any causal role in his injuries.

THE COURT: It kept him from stopping, in the lights most favorable to the plaintiff, because your own evidence elicited from the plaintiff's experts were had he stopped in this time period, it might well have made a difference.

MR. RANDLES: But respectfully, Your Honor, these allegations have never been tied to him stopping smoking.

THE COURT: I'm not suggesting they have. You are the one reading addiction into these allegations. I'm saying they have pleaded that the product is unreasonably dangerous because it increases the nicotine impact which is what keeps a smoker smoking.

To the extent he smoked after September 1, 1988, because of an increased nicotine impact and to the extent that was a factor in causing him harm, there they are. What am I missing?

MR. RANDLES: Your Honor, in the negligence claim -- well, first of all, the only

evidence of impact was throat scratch. Their witnesses testified on cross that when they talked about impact, they were talking about throat scratch because the Court prohibited them from going further.

But under negligence, I'm not making this up, it says in 11-B, "In such a way as to continue and/or enhance the habit-forming or addictive effects of those products," and what I'm saying is the Court prevented Dr. Benowitz and Dr. Ferone from talking about pH and ammonia because there was no reasonable scientific basis to extrapolate back -- at least for those witnesses to extrapolate back -- to addiction.

The complaint does that. The complaint says under 11-B, that these things, all these things we talked about under strict liability -- they don't use the word "addiction" in strict liability, I admit that, although these claims overlap.

In 11-B it says, "By controlling and manipulating the contents of the report" --

THE COURT REPORTER: I'm sorry, you'll have to read that again.

MR. RANDLES: I won't. The point is in

Line 16, for example, they start talking about the addictive effects, and that those substances increase the addictive effects. The Court has ruled that that evidence can't come in. Their experts are not allowed to testify to it because --

THE COURT: Hold on, hold on. Let me just be sure we're on the same track. In the light most favorable to the plaintiff, there is evidence from which the jury could conclude, in the totality of the plaintiff's case, that nicotine is addictive.

MR. RANDLES: Yes.

THE COURT: There is evidence from which the jury could conclude that the addition of ammonia compound increasing the pH of the smoke increased the impact or effect. There is no scientific explanation before the jury linking those two, but the jury has evidence that is competent that nicotine is addictive, that Mr. Williams was addicted, that that addiction happened long before September 1, 1988, I don't think they'll dispute on that.

I have been focusing you on a strict liability claim, because, first of all,

addiction is not pleaded there, and because, secondly, I understand your motion for directed verdict do be that unless they show he got addicted after September 1, 1988, they're out.

That motion is denied on the strict liability claim because that is not pleaded and that's not their theory.

Am I correct?

MR. COON: You are, Your Honor. If they hasn't done what we alleged they have done, he may have started out addicted, but he would have stopped being addicted. Addictions are not only created, they are maintained.

THE COURT: Well, the addiction evidence goes to comparative fault raised by you. The addiction evidence goes to explain why a person continues smoking in the face of the contention that they should stop for their own health, but it's not an element of the strict product liability claim that' pleaded.

And in any event, even if it was, the claim is limited to exposure to a product after September 1, 1988, the defective character of which is pleaded in the complaint and measured by the consumer expectation test.

They don't have to show he became addicted after September 1, 1988, as a matter of law. They have to show that he consumed or used a defective product.

MR. RANDLES: Then respectfully, Your Honor, I think I understand what you're saying on strict liability, then I renew the Comment I motion, because cigarettes, good tobacco, is not unreasonably dangerous because one of its effects may be lung cancer.

THE COURT: And the evidence, Mr. Randles, is not that this was ordinary, good tobacco. The evidence is that there is a jury question on whether this originally ordinary, good tobacco was manipulated with ammonia compounds and other alkaloids and sugar compounds so as to increase the nicotine effect, and in the light most favorable to the plaintiff, a rational juror could include that there is evidence on each one of the specifications in Paragraph 8.

An addiction is not a premise to any of those, so we've argued this one enough. In the interest of time, let's focus on your negligence claim.

MR. RANDLES: All right. I will just say, I still don't understand impact, how it differs, but I'll move on if the Court --

THE COURT: Well, I would say that in the last several days of trial, I have been attentive to the evidence, the plaintiff's theory seems to be that this wasn't ordinary tobacco, this was tobacco enhanced with ammonia and sugar compounds for the specific purpose of increasing of nicotine impact or effect on the smoker so as to keep the smoker smoking, and to keep the smoker coming back.

The jury can believe that if they choose. That does not mean they have to prove addiction as an element of the strict product liability claim. It means that a jury has to be satisfied where those four particulars or one of them makes the product defective and unreasonably dangerous from the ordinary consumer expectation test.

So on your statute of repose addiction argument as to the strict liability claim, your motion is denied. Let's focus on the negligence part of it.

(Pause in proceedings.)

THE COURT: Okay. Mr. Randles, let's go to the second part of your second motion for directed verdict on ultimate repose issues having to do with negligence.

MR. RANDLES: Well, Your Honor, as to this one, there is no doubt that the negligence count pleads addiction. You'll find it on Page 5, Line 16, and you will also find it on Page 6, Lines 7 through 10.

THE COURT: Okay.

MR. RANDLES: And it's exactly the same factual allegations of strict liability except this makes clear that these allegations go to addiction. The same arguments I made --

THE COURT: Your theory is that the plaintiff has to show that he became addicted after September 1, 1988.

MR. RANDLES: Or the cigarettes he smoked from my clients were somehow more addictive. He was already addicted decades before 1988. He was addicted at least seven years before he picked up his first Marlboro, according to Dr. Benowitz.

So my client's activities -- this isn't just a repose motion, it's also a causation. My

client's conduct had no causal relationship to him becoming addicted. There has been no evidence in this case, that any of these things alleged increase addictiveness, so that's precisely the issue that these experts were precluded from testifying about, and jurors should not be allowed to speculate that any of these activities increased addictiveness.

So there is no allegation in this case that my client addicted Mr. Williams, he was already addicted. And there is no evidence in this case that any of these activities somehow made the cigarettes he smoked made by my clients after September 1, 1988, more addictive, so the addiction allegations here should be dismissed.

THE COURT: Let me ask the question this way. It is your contention that if a person was addicted before September 1, 1988, if that's possible, let's just assume that a person is addicted to cigarette smoking before the repose period commences, and thereafter, continues to smoke, as a result of which, according to medical professionals, the continued smoking is a substantial factor in causing the harm, you're saying the plaintiff cannot go to the jury?

MR. RANDLES: Not on addiction. The addiction is done; the addiction is finished. The tort is complete. My client did nothing to addict him. The evidence in this case is that there's no evidence that my client played a role in him becoming addicted, or anything my client did rendered the product he used more addictive. There are allegations in the complaint, but there no evidence in the trial of that.

THE COURT: So your theory is that once addicted, there is just no more harm that can be done.

MR. RANDLES: No. The lung cancer, they're suing on that. Now my point about lung cancer is it can't be pursued in a strict liability count, we've talked about; lung cancer can be pursued in the negligence count, but not the addiction.

The addiction is what these paragraphs I pointed out to the Court are about. The addiction cannot be pursued as an injury. Now if they want to be part of comparative fault or legal excuse, that can be a different inquiry but --

THE COURT: Well, is plaintiff seeking

damages for addiction? Is plaintiff alleging that addiction was in the evidence?

MR. COON: Plaintiff is not seeking damages for addiction by itself. Addiction is part of the mechanism by which cancer was caused. Their argument on this count is a sole cause argument, just like the first one.

If you've got nicotine delivered to the plaintiff before September 1, 1988, and nicotine delivered to the plaintiff afterwards, he stays addicted because of two things: One, he started out addicted, and he gets to September 1, 1988, and it is easier to keep him smoking because of that prior cause, that's true, but the reason he keeps smoking after that for eight more years, is not that he was addicted back in 1950, '55, it's that he was sold cigarettes after September 1, 1988, that had nicotine in them.

THE COURT: Mr. Randles, I think the rational way for me to deal with this now and again later is in the form of instructions that you would like me to consider about what the jury may use the evidence about addiction, for what purpose the jury may use that evidence.

Maybe I am being too simplistic, but when

I apply the statute of repose to the issues of medical causation, it doesn't seem to me to be a difficult question. You speak in positive terms to the jury and you tell the jury that to recover, the plaintiff has to show the defendant was negligent in a way that caused harm to the plaintiff for exposures that happened after September 1, 1988.

And I don't believe your motion allows that kind of claim to go forward, even through there is evidence in the light most favorable to the plaintiff that the product was either defective or the defendant was negligent generally with respect to these theories, so I don't expect this sole cause analysis -- that's the way Mr. Coon characterizes it -- I don't agree that the plaintiff has to show that the decedent was addicted after September 1, and no one is contending he was.

I believe the plaintiff can go to the jury on the theories of liability of which there is evidence that there was culpability, and exposure, the exposure happening after September 1, 1988, and causing harm after September 1. And maybe that is just too simple, but to me

that's Oregon law and I don't see anyway around it.

MR. RANDLES: I understand the Court's ruling. I won't belabor the point except I would just like to make clear for he record. I don't believe I am making a sole cause argument; on addiction, I am making a no cause whatsoever argument, but I think the Court understands my argument.

THE COURT: I don't hear plaintiff saying that they're seeking damages because Mr. Williams was addicted. They are using the addiction evidence in two ways: One, to show bad motive and bad conduct on the part of the defendant, the defendant was aware of these addictive properties and manipulated its product over time.

But secondly, as a defense to the claim that Mr. Williams was making a knowing and voluntary choice to continue smoking, but in any event. the positive element that plaintiff has to prove has to do with exposure after September 1 that caused harm to the plaintiff, and in the light most favorable to the plaintiff, there is evidence to support that.

I don't think it really revolves around addiction, but I am willing to reconsider the theory in the form of limiting instructions in the way you want me to consider charging the jury, and I imagine we'll hear this again at the end of the case, but I have done the best I can do with your Motion No. 2.

MR. RANDLES: Motion No. 3 is deceit, Your Honor. An important point to note, of course, as the Court well knows, is that the plaintiff must prove each and every element of fraud by misrepresentation by clear and convincing evidence. Clearly, they have failed to do so in this case.

The first thing they failed to prove, and I want to talk about affirmative misrepresentation first, and to the extent there is any need to because of preemption and other factors, we can deal with concealment.

Affirmative misrepresentation: The first point is there has been no misrepresentation of fact alleged in this case. The closest they get is Dr. Whelan's comment that, "Well, The Frank Statement really should have started talking about the human studies instead of the animal

studies."

That is not a misstatement of fact. She said, "I would have said it differently or it needed to be more complete," but there is no affirmative misrepresentation of fact made by Philip Morris that was, next element, seen or heard by Mr. Williams.

To date, in this case, we have no evidence of any statement made by Philip Morris seen or heard by Mr. Williams. Mrs. Williams was asked the question. The closest she could get was, "Well, he heard some things by some guy from the tobacco industry on TV about the risks of smoking."

The second thing she said was, "Well, he just didn't believe that cigarettes were bad for him because the companies kept on selling them." Neither of those is fraud and neither of those is reliance on a specific misrepresentation, nor does any of this rise to the level, and I -- I don't want to belabor the affirmative misrepresentation point, because Mr. Coon conceded in the summary judgment arguments before trial that they couldn't point to a specific lie made by Philip Morris, but their

theory is, Philip Morris created some apparent state of facts.

The first thing I would point out is, I do not believe under Oregon law that is sufficient in your ordinary fraud case, and their support for that is a real estate case where things looked fine, but they really weren't. Here you have your standard common law fraud case, and your standard common law fraud case, to prove an abundant misrepresentation of fact, a claim, you've got to show would lie, you have to show an intent for a person to rely on it, and you've got to show they've seen it and you've got to show they relied on it and it acted to their detriment.

There is no evidence of reliance and there is no evidence that any statement caused Mr. Williams' injury. Even if one were to follow the apparent state of facts position that Mr. Coon suggests, there are no statements by Philip Morris to that effect.

There are no statements that he can point to that misrepresented the statement of facts. There is no lie. And further, there is no evidence in the case that Mr. Williams relied on

upon a statement by Philip Morris and that caused his cancer.

Indeed, all the evidence in the case, or virtually all of it says, Mr. Williams smoked because he was addicted. He tried to quit, he tried to quit, he tried to quit, he couldn't, then he got cancer. That was Dr. Benowitz's testimony. That was the essence of Mrs. Williams' testimony, although I'll admit it was inconsistent in some points internally, but not on this fundamental point.

To the extent plaintiffs want to make a concealment claim, the concealment claim is preempted after 1969. As the Court has pointed out, the warnings are legally adequate, as a matter of law, after 1969, to inform the public about the health risks of smoking.

So at least from '69 forward, Mr. Williams is adequately informed about the health risks of smoking. And the Court left open the possibility with respect to consumer expectations there may be some other kinds of evidence that could come in.

But as to fraud, and I would even argue as to consumer expectations, but as to fraud,

certainly no other evidence has been presented, other than maybe he disbelieved the warnings, or the fact that the product was still on the market caused him to think it must be all right, or maybe he heard something from somebody allegedly from the tobacco industry on television.

None of that rises to the level of misrepresentation of fact and requisite reliance and causation, nor does any of it arise to the level of a concealment of a material fact that would change his behavior.

The core fact alleged in this case is addiction; that he smoked because he was addicted; that he couldn't quit or it would be extraordinarily difficult for him to quit, and he did try to quit, but after '69, they can't say he was inadequately informed about the risks of smoking, so it's difficult to conceive of what specific statement or specific concealment could have hidden a fact material enough that he would have stopped smoking. There is just no evidence of a lie or concealment that he relied on in this case.

MR. COON: Your Honor, I think this case

on this issue was fairly well set up. This issue was addressed on summary judgment. We said from the outset, of course, we cannot point to an individual misrepresentation, a specific time in October in 1968, when somebody from the Tobacco Institute went on the television and said "X" and Jesse Williams remembered that one statement, et cetera. That would be absurd; we would never claim it.

This is about as far from a standard fraud case as you can possibly imagine. Defendant's contention amounts to the assertion that if you repeat something often enough and if the strategy is long-term and complex and successful enough, then the plaintiff is out of luck, he has got no cause of action.

Because there were so many misrepresentations, so many attempts to create false impressions, that plaintiff cannot now point to one, or his widow cannot now point to one. Obviously, we're not rely on an individual misrepresentation. We think that issue was decided on summary judgment before trial.

In any event, what happened here is what the Florida Court called in the American Tobacco

case, "A fraud on the American public." There are very specific false statements. The statement in The Frank Statement, "We accept the public health as a basic responsibility paramount to every other consideration in our business."

That was a false statement of their turn of mind, what they intended, what they were trying to do. If you believe the evidence that the plaintiff put on as to why CTR was set up, to create an impression that they were looking for answers, to create, in their own words, the Tobacco Institute's own words, as false controversy, the idea that there was a controversy here without actually denying the charge.

To do what vice-president George Weissman told CEO Cullman they should do right after the 1964 Surgeon General's Report, "We've got to come up with something to give them a crutch, to give smokers a self-rationalization to keep on smoking."

This was a sophisticated combination of the addictive properties of nicotine and to offer rationalizations to the addict, so the

addict would keep on smoking. It has worked beautifully. It is as the Tobacco Institute said, "Brilliantly conceived," and it has worked. It is a long-term strategy, it is a public relations campaign, and it did exactly what they wanted it to do with Jesse Williams, it made him think, gee, this must be okay. Yeah, there is a little controversy out there, I just don't believe it.

This is not a guy who could repeat back for you, even were he alive here today, all of the complexities of the strategy that operated on him, but it's quite clear, under Oregon law, you are not limited to a false statement. Half truths, the intentional creation of misimpressions are absolutely actionable.

That's what happened here. The fact that it was well planned and long term and very successful, does not get defendant off the hook.

MR. RANDLES: If I may, Your Honor, Mr. Coon, despite the very articulate elaboration of their position, supports what I had to say. Not one witness in this case, not one, testified that Mr. Williams relied on any statement or any concealed fact, not one.

We asked Dr. Pollay if he had any idea why Mr. Williams smoked. He said, no, and he was their false impressions witness. We asked Dr. Whelan, "Do you know anything about Jesse Williams?" She said, "No, nothing at all."

It is clear Mr. Williams did not start smoking because of a misrepresentation. He started smoking to keep the mosquitoes off of him. There is no testimony in the case as to why Mr. Williams switched to Marlboro brand cigarettes.

Dr. Pollay testified he didn't know. Mrs. Williams did not bring any evidence on the point. Dr. Whelan didn't know anything about him. No witness in this case suggested why Mr. Williams chose to smoke my client's cigarettes.

Now, he talks The Frank Statement. No witness in the case could testify that Mr. Williams even saw The Frank Statement, let alone relied on it. There is an absence of evidence on the point in this record.

Further, Dr. Pollay, himself, there primary witness about the falsity of The Frank Statement, with Dr. Whelan included, since she

knew even less about -- well, she knew nothing about Mr. Williams, Dr. Pollay knew very little, I am going to focus on him, he testified on cross that he had taken the position, when I confronted him with prior testimony, that after 1964, The Frank Statement would have had very little salience with any consumer, so their expert on this information environment, receptive environment point, admits he has no idea when Mr. Williams started smoking, no idea why he continued smoking.

The Frank Statement itself would have had very little weight after 1964. What we have is a void. Mr. Coon says, "Well, there is so much misrepresentation, there are so many lies, we just can't point to one because the universe is too big. We've asked every witness that said we misrepresented, point to a lie. None of them have.

The closest is what I explained from Dr. Whelan, which isn't a lie, she would have just made The Frank Statement really long and included a bunch of other studies or reordered it, but not that it was false.

Without that affirmative

misrepresentation of fact, the fraud claim has to go. You have to have that because the purpose of requiring an affirmative misrepresentation of fact is so the jury and the Court is not put in the position that you're in now, which is, well, they said a lot of things, so we have to assume something is false.

You take that statement and you look at it to see if it was an intentional lie, if it was mere puffery. You look at the statement of mind and the person who made it. Did they intend on someone to rely on it to their detriment, and then you analyze the recipient of it.

You can't do that in this case because you don't have a lie. Likewise, you can't do it because we don't have a concealment. No material fact has been pointed out so far that was concealed from Mr. Williams.

We talked about the awareness of the public and more fundamentally we've talked about preemption. After 1969, there were legally adequate warnings on packs of cigarettes.

As of this date in the trial, we don't even know how far in advance of 1969, he started

smoking Marlboro cigarettes. You've got a legally adequate warning, smoking history. Smoking history for my client's brand began when he was over 30 years old the and no lie.

They failed to meet the basic requirements of either an affirmative misrepresentation claim or a concealment claim. There is a void of evidence about Mr. Williams relying on acting on any of it.

THE COURT: Mrs. Williams testified that Mr. Williams told her he was deceived. Those were, I think, her words, in describing his reaction to learning he had cancer.

Mrs. Williams testified that she would argue with her husband about stopping smoking and one of his responses, apart from, "Honey, I can't," one of his responses was, "That's a Government warning. It's the Government wanting me to do things. If it was really a problem, the company wouldn't be marketing it."

That's some evidence of Mr. Williams' perspective about whatever it is that was the misrepresentation that's alleged. I am trying to work backwards in reason to see whether the elements of the claim are present.

So I will say, Mr. Randles, to say there is no evidence in the record on what Mr. Williams relied, I think I have to take issue with that, because there is evidence that Mrs. Williams said he felt betrayed and felt deceived and that he had told her on occasions that -- to the effect that he was relying on the tobacco company, because they wouldn't be marketing an unsafe product.

There is some evidence about what his mental state was relative to representations generally. There is also evidence that Philip Morris was a member of the various incarnations of the public relations entities, and to that extent, CTR or TI or TIRC made statements that can be attributed to Philip Morris.

So the fact that there isn't a particular misrepresentation directly associated with Philip Morris, I don't think that is necessarily fatal, but the rule, rather than of the theory, is, I think as both sides recognize, something knew.

We haven't seen this particular approach to a fraud claim in Oregon law. And it's a thought one. What has happened elsewhere in

other jurisdictions on the fraud claim theory, or has there been any action on this front elsewhere?

MR. RANDLES: We frequently encounter this, Your Honor,

THE COURT: I'm sorry?

MR. RANDLES: We frequently encounter this, because the fundamental problem is finding a firm misrepresentation of fact. We brief this issue frequently, and Courts tend to require plaintiffs, on the affirmative misrepresentation claim, to point to a lie.

And this whole environment was somehow affected and we infer his reliance, and I would like to come back to that, is not enough, and we tend to win concealment on preemption.

THE COURT: I am not talking about concealment, Mr. Randles. We've been there, done that. I am talking about other things they said that we've spent many days hearing about.

MR. RANDLES: Well, I am sorry, Your Honor, because I feel like I'm hearing the same things from them on concealment as affirmative misrepresentation. Affirmative misrepresentation requires a statement. It

requires a statement that you can point to and say, "Hey, was that false?" because if it wasn't false, it's not actionable and we don't have it.

You mentioned TI and TIRC.

THE COURT: And CTR.

MR. RANDLES: Yeah, CTR. I asked Dr. Pollay, "Was there any false statement made in any press release or statement by TIRC, or CTR?" He said, "No." That's the evidence we have about that.

THE COURT: In the light most favorable to the plaintiff, this jury could conclude that statements made on behalf of the industry to the effect that nicotine is not addictive were false.

This jury could include that statements on behalf of the industry to the effect that smoking does not cause lung cancer or that that is a legitimate controversy, that those were false statements.

In the light most favorable to the plaintiff, a jury could conclude those were misrepresentations made by the public relations arm of the tobacco industry of which Philip Morris was a member. It's that message which I

understood Mrs. Williams to be talking about when she said her husband felt betrayed and deceived.

That this debate that the two of them had about whether smoking was going to cause lung cancer or not was, in fact, one that he lost on the merits, and he'd been relying on the fact that there was another side of the story.

Now, back to my question about other jurisdictions. Has this claim be tried elsewhere actually in trial?

MR. RANDLES: I don't think so, not named this way, Your Honor. Usually you have some -- you either have the issue be some form -- they do allege the general information environment, but they tend to try to point to false statements.

I have never seen a case where plaintiff's counsel admit, "We can't point to a specific lie he saw, but there must have been some and attributable to Philip Morris."

We don't have that here and without it we can't test it. I mean, if Philip Morris said, for example, in the 1970s -- I mean, if we had a statement we could have tested it on cross, but

we don't.

If Philip Morris said, "The results of that study with the smoking beagles, for example, is questionable. Many scientific authorities doubt it." If that was a statement they had put up, we could then test the witness on cross and say, "Well, is it true that many authorities doubted it?" and they would probably say, yes or no, and we would have examples. That would be a true statement.

The problem here, of course, is without a statement or a finite set of statements that we can then test on cross with a witness, this jury has to simply infer they're false, and respectfully so does the Court. We're getting them third hand, "Well, you said stuff about addiction," but we need to know what we said, so we can test it on cross to see if was false.

If we said the definition has changed over time and uttered the traditional classic definition of addiction, "Cigarettes aren't addictive," Dr. Benowitz agreed with that, so we need to know what the statements are or we can't test it.

They don't have those, so we don't have a

fraud claim, but more importantly we need to remember that the standard for fraud is clear and convincing. Without the statements, I don't see how we can approach the standard.

THE COURT: Let's take a look at all of the statements that the plaintiff alleges in their fourth amended complaint because they are particularly set forth, and let's look at Paragraph 16 and its sub-parts with an eye toward considering whether in the light most favorable to the plaintiff there is any evidence to support, first, the contentions that those statements were made and that they were deceitful, because that's what's alleged.

Paragraph 16, there were deceitful statements containing misrepresentations.

MR. RANDLES: Do you want me to address those specifically?

THE COURT: What I'm saying is that would seem to me to be a logical way to analyze your argument that they can't point to statements, they pleaded statements.

MR. RANDLES: That's fine. The first one is The Frank Statement, accept an interest in people's health, as a basic responsibility

paramount to every other interest in our business.

The problem with The Frank Statement is what I indicated. The witnesses have addressed or testified they have no idea if Mr. Williams saw it. Dr. Pollay said that the average consumer would not have found it salient after the 1964 Surgeon General's Report, and importantly, there isn't a misstatement of fact.

It may be a statement of future intent, it may be a platitude, but it's not a misstatement of fact. The second Paragraph B, is also from The Frank Statement. There is no proof that cigarette smoking is a cause of lung cancer.

Again, no evidence that Mr. Williams saw or relied on The Frank Statement, first. No evidence this is false. Dr. Whelan admitted there was no proof that cigarette smoking was a cause of disease in 1954. And many of their witnesses from the Surgeon General's Committee, particularly Dr. Burns, was formed in 1964 to resolve the cause question and come up with it.

So this is a statement of opinion that was well founded and no witness has testified

that was false. Those are the two out of Frank Statement. C, the statement by Parker McComas. "If industry leaders really believed cigarettes caused cancer, they would stop making them."

The first point, of course, is there is no evidence in this case that Jesse Williams saw this statement or relied on this statement to his detriment or cause of injury. Second, this is a statement of belief by this man. He didn't believe it.

He said he was stating by implications, I suppose, that his colleagues didn't believe it, and those are the time he got out of the business. I don't see any falsity there. It's a statement of opinion.

D, the statements of Cullman at an annual stockholder's meeting. "If there were a connection between cigarette smoking and human disease," the defendant, "would not be in the business of making and selling cigarettes."

The first point I'd make is, it is almost certain that Jesse Williams did not see this statement. He wasn't at the stockholder's meeting. There has been no evidence in the case that it was reported in a way that he would have

seen it or relied on it.

The second point is, again, you have a statement by the executive at the time that he didn't believe it, and, you know, his company would make them. I don't see how that is a fraudulent or false statement, because for it to be a false statement, he would have had to have been saying that and believing that it was false, and they would have to show his belief. There is no evidence in this case of that.

E, Bowling to Whiteside in '63, in the New Yorker. "The tobacco companies believe there is no connection or we wouldn't be in the business."

Again, no evidence that Mr. Williams saw it or relied on it; and, again, Mr. Bowling is talking about his belief and there is no indication in this record at all that Mr. Bowling was stating anything other than his belief. And a true belief, whether you agree with it or disagree with it, especially in hindsight, is not a basis for fraud.

F, the causal link between cigarette smoking and human disease was in doubt or had not been proven in repeated statements. Again,

the specific statements need to be looked at, but there is no dispute at least for some period of time and differs with the witness you talk to, there was doubt about whether the link had been proven.

If we can point to a specific statement talking about a specific study, we could evaluate it. We don't have that. That's not a false statement. That's a statement of opinion and it's a statement well founded in the record of this case to date, but we don't have a time period.

G, back in The Frank Statement, the defendant "always had and always would cooperate closely with those whose task it is to safeguard the public health." That is out of the Frank Statement again. No evidence Mr. Williams saw it, no evidence that Mr. Williams relied on it, no evidence of falsehood.

There is a lot of evidence in this case of cooperation with the Government: Of giving information to the Surgeon General; industry funded research being quoted by the Surgeon General; the AMA ERF project; often funding jointly with the Government; and the Safer

Cigarette Working Group. There is cooperation. Now, if they want to differ on the interpretation, that's fine, but that doesn't make this statement false.

And, H, that cigarettes are not addictive in Congressional hearings, and Congressional hearings are, of course, not in the case.

MR. COON: Could I mention just a couple of things, Your Honor?

THE COURT: Yes.

MR. COON: Number one, the evidence that Jesse Williams got these ideas that they were trying to convey to him is in the fact that what he told his wife was just what they said. He thought, gee, they wouldn't do this. They wouldn't be making these cigarettes if they were really bad for you.

That's exactly the impression they were trying to create in statements, we've got a number of them in the record. "If these things were bad for you, we wouldn't be in the business." That was the impression they wanted to create.

"We're a legitimate business, and, of course, no legitimate business would ever do

this to you." That's part of what is so amazing about this case and what's so unusual about it; that this product has been foisted on the public with this impression, the idea of legitimacy, that it is just okay. "It's a fine product, it must be, or we wouldn't be doing this."

That is one of the central points that they have been trying to convey. This was a very carefully done program. The lawyers reviewed all of these statements, the draft of The Frank Statement, to make sure, let's see, make sure that none of the things that we're saying can actually be demonstrated at least any time soon to be false.

They were trying to get people to do something by creating an impression, by creating a feeling that they could be trusted, that they were reliable, that, "We just want the facts, folks." That's the tone of every last one of these. "Facts you should know. We want you to know frankly what we intend to do about this."

They wanted people to trust them and they gave the impression that they were going to do bona fide research and they spent $300,000 million dollars on CTR, from 1954 to 1997, a

pittance, a fraction of one percent of the amount they spend putting cowboys in Marlboro country up on billboards.

It was deception. It was a complex program, no question about it. A person like Jesse Williams couldn't possibly describe it for you. He's not here to do that. The fact is it was intentional, clever, long-term deception. It worked beautifully and continues to work today on hundreds of thousands of people. It is clearly deceitful.

MR. RANDLES: Your Honor, I was not trusting my memory, so I decided to refer back to Mrs. Williams' testimony on this subject.

THE COURT: That would be helpful.

MR. RANDLES: And the reason I brought up concealment was I guess I was in part right, and here's the point. She testifies, "I would tell him, 'Jesse, you smoke you too much, you know. It is not good for you to smoke so much,' and later on I found out and discovered from reading and watching the television news and things like that, that tobacco was dangerous to your health, I started telling him those things. And that's when he would really get upset with me and say

things like, 'Oh, shut up, honey. You don't know what you're talking about.'.

"I would tell him things like" -- and she talks about the Surgeon General, "And he goes, 'Well, the tobacco company, they never said anything like this is going to harm you. They never said there was anything wrong with tobacco.'

"And he said, 'The Government is always saying stuff about tobacco or something, that you're going to get cancer,' and he said, 'I don't believe it, because the tobacco company just would not do that.'"

Then she later repeats that same testimony, that the tobacco company doesn't say that. That's the reason I was referring to concealment.

THE COURT: Read the part where she testified about his having felt deceived or he had been deceived or he was betrayed, that was another word that she used?

MR. RANDLES: Here is another point where she does address that, Your Honor.

"And he would say, 'Well, honey, you see, I told you -- I told you tobacco wasn't,

cigarettes are not going to kill you because I just heard this so and so guy on TV, and then he said tobacco doesn't cause cancer.'"

THE COURT: I'm talking about her testimony after he learned he had cancer, and she related to the jury what his reaction was. I'm just saying there was some testimony about his -- something that is at least in a university of potential reliance, and when you're telling me there is no evidence of reliance, I have to look at all of the evidence,

MR. RANDLES: I know what you're referring to, but I'm having a hard time locating it.

Yes, Your Honor, it appears to be on Page 85, starting at Line 4 -- starting really at Line 7, I guess, "And what did he say back to you?

"He was angry and he goes like, 'Yeah, well, those darn cigarette companies finally did it. They were lying all the time.'"

Then it goes on to say, "He didn't repeat about what they'd said, but he said he was deceived by them. That's what he said, something to that measure. It was, you know,

they had -- he was like blind or something. I don't know how he said it. I can't remember the exact words he said, but it was like he had been" -- it says, "portrayed," but I think she said, "betrayed," and that's it.

Your Honor, clearly here, we have no specific misrepresentation to point to. In the part of her testimony where she is discussing what he said to her and what she said to him over the years, the closest we get is him saying he saw some guy on TV. It wasn't even an industry person necessarily, we don't know, saying maybe it hadn't been proven.

I don't know if it was a medical doctor, a scientist or whom. He said, "Well, they wouldn't -- the Government says that, but the companies don't say it and they wouldn't sell them if they were bad for you."

That's not a fraud claim. It may be something else, but it is not a fraud claim. Selling a product that's got a legally adequate warning on it that says, after 1985, "Smoking causes lung cancer," isn't a misrepresentation.

It may be something else, but it is not a misrepresentation. And then at the end where he

says they were lying or he was deceived, we have no connection to a statement or any kind of statement. In my opinion, the only reasonable inference is not speculation on this record is perhaps if you take what she says at face value, he was relying somehow on the fact that cigarettes were allowed to be sold.

Mr. Coon basically made the same argument. He said, "Well, you foisted these products upon the market." Well, these products have been foisted upon the market with repeated Congressional hearings, and with one warning label after another, which after '69 are legally adequate, as a matter of law, to inform consumers of the health risks.

Under that rubric, and the absence of any misstatement of fact which they can point to which he saw, it would be rank speculation on the part of the jury to find liability based on a fraud, and certainly can't approach clear and convincing.

MR. COON: I would note one further thing, Your Honor. That is, his testimony that he felt betrayed, I believe was in response to a question whether he believed what they said.

So I do believe it indicates that he, in fact, believed what he was told. That's why he smokes them.

THE COURT: Mr. Randles, as I consider your motion, may I consider it also a motion against each of the particulars in Paragraph 16.

MR. RANDLES: Thank you, Your Honor.

MR. COON: Looking at the particulars, Your Honor, I wonder if we could amend the Congressional hearing statement to be April 15 instead of the April 14 statement to get around the Noerr-Pennington issue.

There is a newspaper ad the day after that we have in evidence, and it says the same thing, "Nicotine is not addictive. We don't manipulate nicotine."

THE COURT: Well, this is why they pay me the big bucks. This is really -- I've got to tell you, you have pulled me to and fro on this issue for months now.

And in my heart of hearts, what I think plaintiff has in the best case scenario, I am not yet saying it is sufficient, but it seems to me the best representation argument plaintiff has or misrepresentation argument plaintiff has

to go with Subparagraph F, that the causal link between cigarette smoking and human disease was in doubt or had not been proven in repeated statements during the last years.

There is evidence in the light most favorable to the plaintiff that that was not true. You accept the Whelan, the Burns, and the other medical experts, it was untrue to continue this manufactured controversy, in the words of Mr. Gaylord in his opening statement, there was no controversy.

Smoking did have a causal link to disease, particularly lung cancer, and that it was false and not true to suggest otherwise at least at some point in time in the recent, more recent past, as opposed to the 1954 Frank Statement.

There may well be evidence and argument about whether in 1954, what degree of public health and scientific certainty about the issue was such as is the case in the last eight years.

So when we analyze this issue in terms of a false representation of fact relied on to the detriment of Mr. Williams, it's my shorthand paraphrasing of the elements of the tort, I want

to work backwards.

I think in the light most favorable to the plaintiff, Mrs. Williams' testimony, some of which you just read, does over some evidence that Mr. Williams was relying on the industry position that there was not a causal link between smoking and cancer specifically, not just disease, but cancer.

And all this other stuff alleged in Paragraph 16, though admissible on mental state type issues having to do with the punitive damages claim, which is independent in any event of the deceit claim, those things, in my mind, don't really fits an analysis of misrepresentation in terms of elements.

The Frank Statement, much of which comprises the specific subparts of Paragraph 16, was maybe the beginning of the strategy from the plaintiff's perspective, but I don't think you can say in a light most favorable to the plaintiff that Mr. Williams relied upon Philip Morris putting his health and welfare paramount to Philip Morris' business concerns.

I think that's evidence that's in the case for mental state purposes, for culpability,

for recklessness, for outrageous indifference to public health generally, but I don't think The Frank Statement forms the basis for a misrepresentation claim, a tort misrepresentation or deceived as pleaded and as proffered by the plaintiff.

So first of all, I would strike, as a basis to seek recovery for misrepresentation, all of the subparts that rely upon The Frank Statement, and I want to be clear, I am not suggesting that that evidence is out of the case for other purposes.

I am saying that I don't think plaintiff can go to the jury on a misrepresentation claim based on the element of The Frank Statement, because I don't think that's the gist of what Mrs. Williams told me. What Mrs. Williams told me and the jurors was her husband believed that the industry's position was there isn't a link between smoking and cancer.

And that's what he was feeling betrayed about and deceived about, as she described it, if you believe her. And you view that evidence in the light most favorable to the plaintiff, so that's what I think her testimony means in terms

of his reliance, and I can't just throw reliance out the window because this happens to be a 50 year marketing strategy that appealed to -- I don't know -- we've thrown out orders of magnitude here today, millions and millions.

I don't know how many people smoke in this country or have since 1950, but I don't think those are or could be on this record a basis for a misrepresentation claim, so I would, first of all, in response to Mr. Randles' accession that I take his motion in parts, I would grant his motion as to Subparagraph 16 A, B -- A and B.

MR. RANDLES: And G, Your Honor.

THE COURT: And G.

Skipping for a movement the middle specifications and going to Paragraph H, I did not hear Mrs. Williams testify that Mr. Williams relied upon representations about addiction or addictiveness. What I heard was as I just summarized it, that Mr. Williams was telling his wife that he believed the tobacco industry's position, which was there is no link between smoking and cancer, and so reliance is not in the record as to addiction, so that would take

out Subparagraph H.

C, D and E are evidentiary examples of F, because they are particular statements about, "We wouldn't do it if we thought this caused cancer," so none of those add anything new, and I would strike C, D and E on that basis.

Which boils you down to the 17 billion dollar question, if you'll allow me to be just a little bit flip at this time of day. I'm sorry, to the $64,000 question, the real question, and that is, whether there is evidence in the record from which a rational juror could conclude that the defendant, Philip Morris, either individually, as Philip Morris Incorporated, through its spokes people and agents, or as a member of CTR, TI or TIRC, made representations that smoking did not cause cancer or was not -- did not cause cancer, whether there is evidence that those representations were made, whether there is evidence that that was a false representation, evidence that that was material to Mr. Williams, in the context of his decision to not stop smoking because it's not the starting of smoking, but the not stopping that pertinent from September 1, 1988, until his

death, material, and that he relied upon that position of Philip Morris through the industry.

And you know, we tell jurors at the end of every case that they may consider direct and circumstantial evidence, and they may base their verdict on either direct or circumstantial evidence, or both.

And I appreciate, Mr. Randles, and I have found your arguments very helpful in trying to screen, as it is my duty, the evidence through the elements, but I don't think a jury is limited to the narrow cast that you've placed on the evidence as you argue it to me.

You made a fine closing argument about why the plaintiff shouldn't prevail on misrepresentation, but you know that is not the standard I have to apply. I have to apply only evidence that is favorable to the plaintiff.

And I've got to tell you, where I sit right now, I think the Court of Appeals would say that there is sufficient evidence in this record from which a jury could conclude that Philip Morris represented that smoking doesn't cause cancer at a time when a rational trier of fact could conclude that that was not a true

statement, that that was material to Mr. Williams' decision to continue smoking, that he relied upon it, and that is caused him harm.

That's where I am at this moment, but I am also not so sure of this ruling as I was of my earlier ones with which I engaged you, and I want to think about it some more. I don't think it should make a difference about how you proceed with your defense, at least right away.

MR. RANDLES: May I respectfully add a couple of things for the Court to consider?

THE COURT: As long as it's respectful, you bet. I have taken enough hits today.

MR. RANDLES: I was much calmer than my colleagues.

THE COURT: Well, you know, you're all human beings. I am a human being, and in case you haven't noticed, I've got an emotional index, too, so be gentle.

MR. RANDLES: Your Honor, respectfully, I don't believe Philip Morris ever said cigarettes don't cause disease or cause lung cancer. I don't believe there was ever that kind of statement, and the Court just indicated that.

THE COURT: Let's me tell you what I'm

thinking of and you tell me why this is wrong. We had a number of witnesses testify about what the industry's position was through CTR, TIRC and TI, and maybe -- or maybe not and I have to let the advocates address this, but the witnesses have said to this day, to now, the defendant's public position has never admitted that smoking causes cancer.

MR. RANDLES: You see, that's -- I'm sorry.

THE COURT: You want to say that that is a non-statement, and what I'm telling you is that in a rational juror's mind, Mr. Williams saw that not as a non-statement, but as an affirmative position.

He said to his wife, they lied, I've been had, those darn tobacco companies, smoking causes cancer, look at me. I've added to that, but I'm making an analogy here. In the light most favorable to the plaintiff, a jury could conclude that smoking does cause cancer; that anyone look says it doesn't is making a false statement when they say it doesn't; and to the extent that position is attributable to Philip Morris in time relevant to this case, that that

could be a misrepresentation of a material fact on which the decedent relied to his detriment.

MR. RANDLES: There is a second point about preemption, I would like to mention. On that one, Your Honor, if I may, that's why it is so important to have the statement at issue, because I don't think my client of said it quite that way, but I don't need to trust my memory, and the Court shouldn't have to trust the Court's memory.

We should have a statement. Many of them were cast in terms of opinions we do not believe the evidence has sufficiently established. They were cast in many different ways, and that's why we need the specific statements, so we can test it. If someone says we don't believe, we can test it.

THE COURT: Let's me give you this challenge. And let me say I am trying to be as frank and direct as I know how, and I'm trying to make the right ruling for the right reason in the right way, so that whatever happens in this trial, we don't do this again, any of us, at least not in this case.

And I've told you what I think is the --

is the inevitable conclusion that an Appellate Court would reach in terms of whether there is some evidence about misrepresentation on that theme, but let me suggest to you, with your help, and as I say, there is no time pressure to make this decision this instant.

I told you where I am inclined to go. You go through and you show me the statements attributed in the trial record on this subject, and we'll have this discussion again, about whether there is a risk of preemption or there isn't.

MR. COON: If I could add while counsel are conferring, I believe that in the Henley case in San Francisco there was a broad count similar to this that was submitted to the jury we came back. We can try and verify that.

MR. RANDLES: Before I advance to my preemption point, I am reminded by capable appellate counsel, that the standard is clear and convincing.

THE COURT: I haven't lost sight of that. I am looking for, first of all, any evidence and then once I identify the evidence, my task is to determine, is whether a rational trier of fact

could find that that was clear and convincing as to all the elements of the Court.

And I thank Mr. Beattie for making it clear, so that we say it right, right now.

MR. RANDLES: We will go back and look for that, Your Honor.

THE COURT: I'm just telling you that's what I think would happen. Now, I'm not saying that the jury will get there, but, you know, I have been listening. I did not start this trial thinking anybody had done anything, and I've got to tell you that I think a rational juror, not me, I'm maybe irrational at this point, but I think a rational juror could conclude that the industry's position over time regarding causing cancer is false.

MR. RANDLES: The second point I would make, and I know we have been on this for a while and we there are some other matters I would like to address with the Court.

The second fraudulent affirmative misrepresentation claim found preemptive by the Cippollone Court was the neutralization claim creating a false impression about the harmfulness of the product, I would note to the

Court, without going into any depth that --

THE COURT: Let me tell you what I am remembering from our preemption argument, about which I have been instructed a lot from all sides, we're talking about affirmative misrepresentations here, and that's why I'm asking you to not have me rely on an impression about the state of the record, but what the witnesses said about this issue of plus state of knowledge, not that the witnesses are right as a matter of conclusive proof, but it's evidence that the jury could evaluate in determining whether there was a misrepresentation, and it was false.

MR. RANDLES: I appreciate that, Your Honor. I just want to make sure the record was clear that our position would be if the claim is reduced to what Mr. Coon explained, a false impression about whether or not cigarettes cause cancer, our position that would be preempted after 60 days.

THE COURT: I am not focused on an impression here. I am rely upon evidence that I thought I heard that the tobacco industry has falsely affirmatively stated through a public

relations arm of which Philip Morris is a member, that smoking does not -- that there is no link between smoking and cancer, there is no causal relationship between smoking and cancer, smoking doesn't cause lung cancer, those kinds of affirmative statements.

There is evidence from which a jury could include those are false statements, as time advances, as the state of the art improves, as medicine becomes more and more and more reliable, and witnesses up to and including our doctor yesterday.

And it's that which I believe is the only piece from which there is a reliance foundation on which to go back to look at the other elements for support, so right now I am denying your motion as to sub F. I am willing to reconsider it in any appropriate way, including instructions for reconsideration at the end of the defendant's case.

MR. RANDLES: We will look at those statements, Your Honor, because honestly I don't think they're there.

THE COURT: I certainly hope the plaintiffs will also do that, so I am not left

to my own memory.

MR. RANDLES: The fourth one -- if the Court is ready?

THE COURT: Oh, I'm ready.

MR. RANDLES: The next one is the feasible alternative design requirement. As we indicate in our briefing, plaintiffs must allege as part of the strict liability claim, and as part of the negligent design claim, that Philip Morris could have manufactured a safer cigarette.

And that breaks down into several requirements, the plaintiff must prove that they failed to prove. First, they have to prove that a safer cigarette is scientifically feasible. Second element, they must prove commercial feasibility.

And the third element, which has two subparts, is they must prove that it would have prevented the injury, which requires a showing of Mr. Williams would have actually used the product, and by that use prevented his injury.

THE COURT: Okay. Remind me where the feasible alternative design fits in the claim for relief.

MR. RANDLES: Yes, Your Honor. It is an absolute requirement under Oregon law for the strict liability claim.

THE COURT: So if a manufacturer has a defective and unreasonably dangerous product for which there is no alternative safer design, and it is marketed in a defective and unreasonably dangerous condition, it is not actionable?

MR. RANDLES: If there is no safe or feasible alternative design, I am aware of no Oregon case that says there is a duty to withdraw a product with inherent risks, when the public is aware, is informed of the risk, particularly by a legally adequate warning to withdraw that product from the market, and that is not what is pled here.

The negligence claim specifically pleads that there was --

THE COURT: "In failing to manufacture and sell cigarettes without the characteristics described in Paragraph 11-C and D."

MR. RANDLES: Yes, Your Honor. The evidence in the case as to a feasible alternative design essentially all came from Dr. Ferone. What he testified was this: He

testified that as to a cigarette with tobacco, Next, the de-nicotized cigarette by Philip Morris, was about as close as you can get, and admitted it was a commercial failure.

Now, he speculated as to some reasons for the commercial failure, and his primary speculation was, "Well, you didn't tell consumers it was safer." Of course the FTC doesn't allow the companies to make health claims, as other evidence in the case, some of it from the plaintiff, clearly indicates.

The Next cigarette, while scientifically feasible, was not commercially viable, and in any event, there is a complete absence of evidence that Mr. Williams would try the product. Indeed, as to all of Dr. Ferone's claims of safer ideas for cigarettes, as to all of them, he admitted he has no idea whether Mr. Williams would have tried them.

Dr. Ferone also indicated as to his other notions of cigarettes that might be safer, he admitted upon cross, all the cigarettes would have to be tested to see if they were, indeed, safer to see if flavorants could be added, that would be safe.

Laboratory testing would be required, and epidemiological testing, so there is no testimony from Dr. Ferone, who is the safer alternative design witness, that any of those are scientifically viable. There is which a complete absence of evidence from Dr. Ferone that they would be commercially viable, or that Mr. Williams would have used them.

As a matter of fact, the only evidence in the case about Mr. Williams' practice, indicates no interest in trying other brands of cigarettes. He tried Marlboro Lights for some period of time, but never did he actually smoke the lowest tar, lowest nicotine cigarettes on the market.

He never tried any of the various cigarettes that some of the public health officials, including Dr. Burns, indicated might be safer, so as to these alternate designs might have -- might be alleged in this complaint, with complete absence of evidence of the elements.

THE COURT: Let me go back to my other primary, and maybe you saw it as a facetious question. If a cigarette manufacturer goes beyond pure tobacco by adding things like

ammonia, alkaloids, sugars to enhance the nicotine impact or effect that a smoker has.

And if a jury concludes that cigarettes like that are defective and unreasonably dangerous from the consumer expectation, more than what the ordinary consumer expects; that there is no safer alternative design, are you saying that there has to be theoretically a safer alternative design before a manufacturer of a defective unreasonably dangerous product is liable for marketing the product in the first place, as a matter of law?

MR. RANDLES: Well, of course, I disagree that our product has any of those, but there are products that are marketed that have inherent risks, intrinsic patent dangers.

THE COURT: Guns.

MR. RANDLES: Nail guns, cars, airplanes. There are many products that even at the safest degree they can be made pose risks to human beings, alcohol. Cigarettes are among those products. That's the point of Common I, for example, and that's the reason good tobacco can't be held defective for that reason, so the answer is, by definition, cigarettes are not

defective because they cause disease.

Therefore, they're not defective because they cause disease because the risks are known. If plaintiff wants to say cigarettes are somehow defective, one of the elements is to show there is a safer alternative design. Now if indeed cigarettes can't be made safer, then there is a legislative determination to be made.

Are they too dangerous to be sold, or are they to be sold with the available information to the public including legally adequate warnings. As part of the strict liability claim in Oregon, I am aware of no authority for the premise that a strict liability claim can be asserted where there is no alternative safer design.

In other words, I don't know of any law in Oregon which says that a strict liability claim can be read as a claim to ban the product.

THE COURT: Would you mind if Mr. Coon spoke to that before we go any farther, so I can get my bearings on the alternative design piece.

MR. COON: I think it's important to keep our bearings here, because there are two different claims that appear to be addressed.

One, on the products claim, the alternative, safe design is fairly easy: Don't add ammonia, manipulate the pH, manipulate sugars, et cetera.

I think the evidence is that one can do that and still have a cigarette, it might not be 50 percent of the market the way Marlboro is, but you still have a cigarette, so as to the product claim, there is a feasible alternative design quite easily.

Number one, should that be required? Number two, that is not required. Wilson against Piper is pretty clear that in many cases, plaintiff will want to show, but in product liability, does not have to show a feasible alternative design.

Number three, if you want to get into plowing new ground, which I know the Court is tired of here, and rightly so, the fact that Next, for example, was a commercial flop, people didn't want it because the only reason they smoke is for nicotine, that doesn't mean that it's not feasible in terms of your ability to produce it and put it out there, and see what happens.

If people don't want it because they're

addicted to nicotine and that's all they want in a cigarette, I don't think that is going to end up qualifying as non-feasible for feasible alternative design purposes, but we don't need to get to that part of the analysis.

Number one, on products, they have a very feasible alternative design to stop doing those things that they're doing to trip the nicotine. Number two, it's not a part of Wilson against Piper anyway.

THE COURT: Do your trial memos address that issue?

MR. COON: Actually, on the Rule 21 --

THE COURT: Talk to me about trial memos right now.

MR. COON: The trial memos do not address that, because they tried to get us to allege that back when the complaint was first attacked.

THE COURT: And again, nor am I going to let the plaintiffs hold me to motion practice history or test of orders.

I want to be sure I am on solid ground on the alternative design piece, and I will accept your invitation to brief that piece, as an element, necessary or not, of the strict product

liability claim, the 402 (a) claim or the negligence claim.

Mr. Randles, do we need to address this before tomorrow's testimony?

MR. RANDLES: No, Your Honor, we don't need to address it before tomorrow's testimony,

THE COURT: May I take this piece under advisement and ask for help from both sides on the alternative design issue without doing violence to your plans?

MR. BEATTIE: We have it at Page 9 of our trial memorandum, Your Honor.

THE COURT: Page 9?

MR. BEATTIE: Page 9.

THE COURT: Are you going to want to do more?

MR. BEATTIE: I think that's enough, Your Honor.

THE COURT: Okay. I see that now, thank you, Mr. Beattie.

They talk about the Piper, so why don't you give me a one or two page quick response on that.

MR. COON: Is Monday okay on that, Your Honor?

THE COURT: I am wanting to not do violence to their theory. If they need me to make a ruling, I will, but I'd rather get some help on it.

MR. COON: I don't think they need this tomorrow.

MR. RANDLES: We may have some witnesses that are going to address alternative designs, Your Honor.

THE COURT: Okay. Then let's do this, you don't need to write it up, just go refresh yourself on the issue, and we'll -- do you want it in the courtroom at 8:30 tomorrow? We can talk about this on the record in chambers while people are setting up in the courtroom.

MR. RANDLES: That would be fine, Your Honor.

THE COURT: Can you do that, Mr. Coon?

MR. COON: I'll do it.

THE COURT: Is that going to be the end of the world or something?

MR. COON: Well, there is just preparation for tomorrow to do, and that's the only question.

THE COURT: Are you on deck for that?

MR. COON: No, I am just preparing things.
THE COURT: You have Wilson v. Piper right at your fingertips. Just read the case. All you need to do is talk to me about it. You don't need to write it.
MR. RANDLES: May I hand that to Mr. Beattie in the morning? I have a witness in the morning.
MR. BEATTIE: 8:30, Your Honor.
THE COURT: 8:30, we'll talk about the motion for alternative design arguments.
MR. BEATTIE: That's limited to the strict liability claim only.
THE COURT: And the negligence claim. Your motion, as written, addresses strict liability and Paragraphs 11-B and E of the negligence claim.
MR. RANDLES: Thank you, Your Honor.
THE COURT: Although, as I read 11, E look more like the safer alternative design and I didn't see that B really did.
MR. RANDLES: It could have been typing gremlins.
(Recess taken, 4:25 p.m.

to 4:30 p.m.)

MR. RANDLES: What I would like to do, with respect to the sixth motion, which is the punitive damages motion, I know there has been a lot of discussion of that for the last couple days, and I would like with the Court's permission and with counsel's agreement, to say I understand what the Court has said, I would like to preserve my record on the issue via this motion.

I would like to incorporate by reference, Mr. Dumas' statements yesterday and today, and the objections raised in our answer, but I would not request further oral argument if the Court and counsel would agree I have preserved this.

MR. COON: I believe this has all been covered, Your Honor, no objection.

THE COURT: The one thing that is in the written material that we didn't talk about expressing in the record would be the assertion that there has to be a personal direction of the misconduct to the actual plaintiff, and I just believe that is too narrow a reading.

The conduct has to be reckless and outrageous and met the standard and it has to

cause harm to the particular plaintiff, and I believe there is sufficient evidence, as I said earlier, but I don't think I addressed that particular focus of your argument and I wanted to be sure it was clear for the record, I hadn't overlooked it, but we are incorporating your written motion, and all of Mr. Dumas' presentation.

MR. RANDLES: And the defenses we raised in our answer, if they differ in any material respect.

MR. COON: That's fine with the plaintiff.

MR. RANDLES: Thank you.

Your Honor, with respect to the next motion, consumer expectations and preemption, here is the point I would like to make, and I'll try to make it short, considering the hour.

It is not and has never been our position that in this case, that preemption prohibits an examination of consumer expectations; in other words, we do not contend that the legal adequacy of the warning entirely forecloses an examination into perhaps other expectations a consumer might have that somehow are not covered

by that adequate warning or encompassed by the adequacy of the information provided to the public by the warning, by the adequacy of that warning.

Your Honor, though, to the extent that there has been testimony in this case that the ordinary consumer's expectations after 1969, were deficient in their understanding of the potential health risks and health implications of smoking, it is our position that we are entitled to a directed verdict as to -- as to any claim, particularly the strict liability claim in which the allegation that the public expectations were deficient with regard to the health risk of smoking after '69.

In other words, you have legally adequate information to the -- and there has been testimony on this, and that's the reason I'm making this motion. I am not saying to the extent they say, you put things in your cigarettes the public wouldn't expect, that that is covered, I am not alleging that, Your Honor, but I am saying that to the extent there has been testimony, and there has by Dr. Pollay, Dr. Whelan and others, the public didn't

understand and appreciate the risk of smoking. After 1969, Your Honor, that's not permissible.

THE COURT: Let me be sure I am understanding, and then, Mr. Coon, you can address this to the extent you think you need to. The defendant agrees that any evidence in the case about additives, be they alkaloid compounds, sugar compounds or whatever, are not preempted because they're not, and to the extent consumer expectation is linked, as a matter of fact, in the plaintiff's theory, to those alkaloid additions or sugar additions, the defense does not contend that theory is preempted. So far so good?

MR. RANDLES: Yes, Your Honor. We would not contend that an allegation the consumer didn't expect there to be an additive or something. Now, if they went further and said putting an additive in a cigarette meant that the cigarette became more dangerous than a consumer would expect with respect to the basic health risks of smoking, we might have a problem.

But to the extent they're saying, the ordinary consumer, wouldn't expect this to be in

a cigarette or that to be in a cigarette, and somehow that had the effect of making the product defective, and the consumer relied upon his expectations about that not being in the product, I do not contend that that chain of events is preempted.

THE COURT: The consumer expectation test is tied to dangerous, dangerous beyond that which is contemplated by the ordinary consumer.

MR. COON: I would like to ask for some help here, and that is, I have lost my procedural bearings here.

THE COURT: Motion No. 5.

MR. COON: For directed verdict to do what? That's what I am not clear about. Is this -- I mean, if it is a directed verdict against the product claim, then we think that's pretty easy to deny because we say the product is defective because it has characteristics, and that's the word comment I use, that the ordinary consumer does not know about ammonia, pH adjustment, et cetera.

That's what the first claim says, and so the consumer expectation test, certainly there is evidence from which the jury could find that

consumers don't expect that, so the first claim survives this motion, I think. Now, what beyond that defendant claims, I am not sure.

MR. RANDLES: Actually, I agree with much of what Mr. Coon just said and I apologize for the lack of clarify.

THE COURT: Hallelujah.

MR. RANDLES: Mr. Coon and I often agree.

THE COURT: Could have fooled me.

MR. RANDLES: Paragraph 9, Your Honor.

THE COURT: Okay. Let's go to Paragraph 9.

MR. RANDLES: Starting at Line 17 of Page 4, the word the, "The effects of defendant's products are widespread and deadly, and defendant has known this for many years. Defendant has deceived the public concerning the health dangers of cigarettes and the addictive properties of nicotine."

To the extent that somehow plaintiff's claim that there were additives in cigarettes that somehow the ordinary consumer didn't expect, and somehow that had an effect on Mr. Williams, that might not be preempted, but if they're saying what Mr. Coon just said, which

is, "Yeah, we're saying they're additives in cigarettes, and those additives help make cigarettes somehow a little more dangerous, the public is adequately informed as to the health risks of cigarettes sold after 1969.

Unless they can show up injury or some condition from those additives that changes the fundamental nature of cigarettes, I don't see how they escape preemption, and lung cancer doesn't do it, the public has been adequately informed.

The confusing part of that is the language here and the testimony in the case. There has been testimony in the case from Dr. Whelan and from others about, "Well, the public underestimates the risk of smoking. The public doesn't appreciate the risk of smoking."

That is preempted. The public has been adequately informed, as a matter of law, after 1969; that evidence shouldn't be in the case, and any claim based on that evidence shouldn't be here.

Now, if there is something unique and different about Philip Morris' cigarettes because of these additives, I am not asserting

preemptions to that because I am not sure I understand it, but to the extent there is an allegation and there have been plenty statements in the case from Dr. Pollay as another example and from Dr. Whelan, and from Dr. Burns, the public just doesn't appreciate the risk of smoking, that's preempted, and to the extent that that's the punch line of the strict liability count, it is, indeed, preempted.

MR. COON: I am not sure what a punch line is procedurally, if we're complaining about evidence, that's not what we're doing here. We're talking about directed verdict.

If one says that consumer expectation is the test for product liability, but consumer expectations must always be accurate as a matter of law, because the warning is adequate, so really consumer expectations must relate only to the subjects of the warnings themselves, then then Cippollone, C-i-p-p-o-l-l-o-n-e, would have held no such thing as a design defect claim, they're all preempted. That is plainly not the law.

Consumer expectations here are not satisfied because consumer expectations, under

comment, relate to the characteristics of the product. Those characteristics are as we allege and prove, we believe; not what consumers expect.

THE COURT: The preemption piece arising from the adequacy of the warnings, goes to any claim for which the plaintiff asserts the warnings were inadequate.

The warnings are adequate, as a matters of law, to the extent plaintiff's argue or make an allegation that the warnings are not adequate or that they were neutralized, the warnings were neutralized, those claims are preempted. That's as far as it goes.

MR. COON: We've done that as to the complaint on all the summary judgment motions, and nothing has changed about it. We got rid of all the concealment, we got rid of those things.

THE COURT: Consumer expectation is not coextensively the adequacy of the warnings. I don't think Cippollone, or all the other cases about preemption you brought to my attention, say that. It is defining the universe beyond which is there coextensive, that will be the art of our instructions to the jury.

MR. RANDLES: I agree.
THE COURT: Motion denied on that ground. They're not one from the same.
MR. RANDLES: Understood, Your Honor, do you want me to stop on that?
THE COURT: If you have more to say for the record, you need to say it.
MR. RANDLES: Yes, Your Honor.
THE COURT: I am trying to use a shorthand description so that the Court of Appeals understands what I understand your motion is.
To the extent your contending that the consumer expectation standard is defeated in a cigarette case, as a matter of law, because the warning is adequate, they're not coextensive, and one doesn't supplant the other, so that motion is denied.
MR. RANDLES: I am not contending that, Your Honor, that's why I didn't move against this to start with. What Cippollone said, and design defect claim wasn't before the Cippollone Court, but what Cippollone made clear is the label you attach to a claim is not dispositive when the claim is preempted.

In some ways, it is helpful to ignore the label and just look at what is being asserted in the case. In this case, my position is this: The warnings are legally adequate to inform the public as to health risk of smoking after '69. That's why they were put on there.

The public, therefore, as a matter of law, and as explained in the many cases I brought to the Court when we briefed this, the public is adequately informed as to the health risks of smoking after 1969. To the extent --

THE COURT: To the extent that it bars a claim for failure to warn.

MR. RANDLES: To the extent that it bars any claim that rests in whole or in part upon a claim that the public is inadequately informed of the health risks of smoking after '69.

THE COURT: In the form after a failure to warn.

MR. RANDLES: Respectfully, no, Your Honor. An implied warranty has been found preempted, concealment claims have been found preempted. That's why it is important in the Cippollone language and the Court's file, the label you attach to the claim is irrelevant for

preemption purposes.

Adequacy, if the public is adequately informed after 1969, about the health risks of smoking, period. That's what Metronic (ph) says. Metronic says, "That's it." Congress decided what warning was adequate. That's what the labeling act says the purpose was, to adequately inform the public about the health risks of smoking.

I do not contend in any case that can be conceived, that consumer expectations are coextensive with preemption. That's why I didn't make the motion at the summary judgment stage.

The reason I am making the motion now is there has been a lot of evidence offered in the case, but the consumer expectations after 1969, under appreciated or undervalued the health risks of smoking. That is preempted and it doesn't matter what you call it, that's preempted.

And as the case law says, any claim that rests in whole or in part upon alleged inadequacy of information is preempted and that their strict liability claim rests on that kind

of allegation.

THE COURT: Let's go back to your motion in the form in which it is made. It is focused on an consumer expectation standard. I think we did cover a little bit by way of agreement, and that is to the extent plaintiff's rely on evidence that there are alkaloid or sugar additives to ordinary good tobacco, and to the extent that creates a risk that is beyond the ordinary consumer expectation, that's not preemptible.

MR. RANDLES: I will brief that, Your Honor.

THE COURT: To that extent, your motion is denied.

Does the plaintiff's claim about consumer expectation go further than that?

MR. COON: I don't think so, Your Honor.

THE COURT: Then let's stop.

MR. RANDLES: Thank you, Your Honor.

THE COURT: Okay. Somebody needs to write that down, so we don't forget what it is you committed to. You wrote it down.

What else, Mr. Randles?

MR. RANDLES: Your Honor, I don't know if

this is something we can get into right now. We have a motion for -- asking the Court to take judicial notice of certain materials.

THE COURT: What I would find helpful is just a quick summary from Mr. Coon about plaintiff's position. I didn't get a chance to read what he handed up in writing. I have read what you handed up.

MR. COON: I gave you my only copy -- Mr. Randles has been kind enough -- the idea that runs through these is that judicial notice is discretionary, and should not be taken of things that are either irrelevant or are cumulative.

For example, there was a labeling act, that hearings were held in the labeling act several different times, that the FTC had a machine, and it had a reg' about the smoking machine. All of these are matters that have been testified to over and over, and I think everything that is requested for judicial notice here fits that description.

It has been testified to. The warnings themselves, the labeling act, those are defense exhibits. Our objection is to having those

things that the defense likes, reemphasized as a matter of judicial instruction.

THE COURT: Are these defense exhibits received in evidence?

MR. COON: Yes.

THE COURT: Let me ask, Mr. Randles, to resume this argument when we take it up again, because we are going to recess. With a description of the purpose for which each item of judicial notice is offered, you have to go back to the basics, and then I can evaluate the relevance and cumulative objections. I think that's what you are telling me.

MR. COON: I would characterize that there are individual exceptions, but that's basically it, Your Honor.

THE COURT: I think we need to take it purpose by purpose, so if you'll just prepare a quick summary, we'll go item by item down the list.

MR. COON: Should we do that tomorrow?

THE COURT: If we have time. We're starting with the jury at 9:00.

MR. RANDLES: Could I do that orally or would the Court prefer in writing?

THE COURT: Oh, that's fine. I actually prefer oral presentations.

MR. RANDLES: I thought so, thank you, Your Honor.

THE COURT: Thank you. We're off the record.

(Court adjourned, Afternoon Session, 3-11-99, at 4:55 p.m.)

REPORTER'S CERTIFICATE

I, Katie Bradford, Official Reporter of the Circuit Court of the State of Oregon, Fourth Judicial District, certify that I reported in stenotype the oral proceedings had upon the hearing of the above-entitled cause before the HONORABLE ANNA J. BROWN, Circuit Judge, on March 11, 1999;

That I have subsequently caused my stenotype notes, so taken, to be reduced to computer-aided transcription under my direction; and that the foregoing transcript, Pages 1 through 167,both inclusive, constitutes a full, true and accurate record of said proceedings, so reported by me in stenotype as aforesaid.

Witness my hand and CSR Seal at Portland, Oregon, this 11th day of March, 1999.

_____

Katie Bradford, CSR 90-0148
Official Court Reporter

I certify this original/duplicate original is valid only if it bears my red colored CSR Seal. Katie Bradford

GENERAL INDEX

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WITNESS INDEX